Petition

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VETCO INC.; RONALD G. CULLIS, Financial Vice President, and/or LARRY R. LANGDON, Secretary,

Petitioners,

v.

UNITED STATES OF AMERICA and ROBERT R. HANDLEY, Special Agent of the Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a court of the United States may enforce agency compulsory process for the production of foreign documents and impose sanctions for non-production when, on the face of a foreign statute, production would subject the person to whom the process is addressed to criminal prosecution and the court has made no finding that, despite the terms of the foreign statute, the documents can be produced without realistic fear of criminal prosecution.

LIST OF PARTIES

The names of all parties are included in the caption to this Petition.[1] Deloitte Haskins & Sells, a certified public accountancy firm, was a party to proceedings that were consolidated and decided with this case below.

[1] Vetco Inc. is a wholly-owned subsidiary of Combustion Engineering, Inc. Combustion Engineering and its wholly owned subsidiaries own a 20% or greater stock interest in the following domestic corporations: C-E/MHI Fan Company, Spire Corp., C-E/Studsvick, Inc., MCES, Combustion Engineering/Neyrpic Hydro Power, Inc., Texas Tempered Glass Co., The Tyler Wayne Research Corporation, Liberty Reed, The Delhi Foundry Sand Company, Unimin, The Pryor Giggey Co., Buffalo China Clay Co., D.S. Robertson, Tylinter, Inc., Seaton Engineering Company, Tomahawk Power & Pulp Co., Benton Clay Co., Basic Ballistics Company, CE-KSB Pump Company, Inc. It is not known that the remaining stock in any of these corporations is publicly held.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	20
APPENDIX A (Opinion of the Court of Appeals for the Ninth Circuit)	1a
APPENDIX B (Order of the Court of Appeals for the Ninth Circuit denying rehearing and rehearing *en banc*)	19a
APPENDIX C (Rules 44.1, 52(a) and 81(a)(3) of the Federal Rules of Civil Procedures and Article 273 of the Swiss Penal Code)	21a

TABLE OF AUTHORITIES

CASES: Page

American Industrial Contracting, Inc. v. *Johns-Manville Corp.*, 326 F. Supp. 879 (W.D. Pa. 1971) 16

Calcutta East Coast of India and East Pakistan/U.S.A. Conference v. *Federal Maritime Commission*, 399 F.2d 994 (D.C. Cir. 1968) 18

In re Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962) 15

Federal Maritime Commission v. *DeSmedt*, 268 F. Supp. 972 (S.D.N.Y. 1967) 15

FTC v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) 8, 19, 20

Ings v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960) 15, 17, 18

In re Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952) 18

Mannington Mills, Inc. v. *Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979) 12

Ohio v. *Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978) 18

SEC v. *Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945) 18

Societe Internationale pour Participations Industrielles et Commerciales v. *Rogers*, 357 U.S. 197 (1958) .... *passim*

United States v. *Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976) 15

United States v. *First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968) 16

In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980) 8

In re Uranium Antitrust Litigation (Rio Algom), 480 F. Supp. 1138 (N.D. Ill. 1979) 8, 15, 17, 18, 19

In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977) 12, 16, 19

STATUTES, RULES AND REGULATIONS:

28 U.S.C. § 1254(1) 1

Table of Authorities Continued

Page

Internal Revenue Code of 1954

§ 954(b)(3)(A) 2
§ 7601 *et seq.* 3

Federal Rules of Civil Procedure

Rule 44.1 14
Rule 52(a) 12
Rule 81(a)(3) 12

FOREIGN CITATIONS:

Rio Tinto Zinc Corp. v. *Westinghouse Elec. Corp.*, [1978] 2 W.L.R. 81 (H.L.) 7

In re Westinghouse Elec. Corp. & Duquesne Light Co., 16 Ont.2d 273 (1977) 7

Swiss Penal Code

Article 34 5
Article 273 ..... *passim*

Protection of Trading Interests Act, 1980, c. 11 § 2, 20 Mar. 1980 (U.K.) 19

Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Austl. Acts No. 121, § 5 (Australia) 19

French Law 80-538, Journal Officiel de la Republique Francaise (17 July 1980) 19

Atomic Energy Control Act, 1970, Can. Rev. Stat. c. A19 (Canada) 19

Uranium Information Securities Regulations, Stat. O. & R. 76-644 (1976) (Canada) 19

Business Records Protection Act, 1947, Ont. Rev. Stat. c. 54 (1970) (Ontario) 19

Business Concerns Records Act, 1964, Que. Rev. Stat. c. 278 (1964) (Quebec) 19

MISCELLANEOUS:

Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 Am. U. L. Rev. 323 (1981) 8

Table of Authorities Continued

Page

Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 Nw U. L. Rev. 487 (1969) 8, 18, 19

Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 Va. J. Int'l L. 747 (1974) 8

Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 Yale L. J. 612 (1979) 8, 20

Restatement of the Foreign Relations Law of the United States (Second), § 40 (1965) 16, 17

Restatement of the Foreign Relations Law of the United States (Revised), §§ 403 and 418 (Tent. Draft No. 2, March 27, 1981) 17

American Bar Association Resolution, Adopted August 11, 1981 8

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Petitioners, Vetco Inc. and two of its former officers, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The district court wrote no opinion. The opinion of the court of appeals is not yet officially reported and is set out as Appendix A to this Petition at pages 1a-17a, *infra*.

JURISDICTION

The judgment of the court of appeals (App. A, p. 1a, *infra*) was entered on May 11, 1981. A timely filed petition for rehearing was denied on July 17, 1981. (App. B, p. 19a, *infra*.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Article 273 of the Swiss Penal Code and Rules 44.1, 52(a) and 81(a)(3) of the Federal Rules of Civil Pro-

cedure are set out as Appendix C to this Petition at pages 21a-22a, *infra*.

STATEMENT

The petitioner Vetco Inc. manufactures, sells and leases equipment associated with offshore oil and gas exploration. It is a worldwide concern, operating directly and through subsidiaries in many countries. In each such country it is subject to that country's laws, and in many aspects of its business as a United States corporation it is subject to United States laws as well. Conflicting legal demands on Vetco as with all international enterprises are a constant potential. In this case the potential was realized in the form of action by United States courts to compel Vetco to produce documents whose production would cast Vetco and a subsidiary into violation of a criminal statute of the country where the documents reside, a statute enforceable by imprisonment and fine. Vetco submits that, in compelling production in these circumstances, the courts below strayed from the path of fairness and international comity marked out by this Court for cases of this sort.

One of Vetco's foreign subsidiaries is a Swiss corporation, Vetco International A.G., known as VIAG. During the years at issue provisions of Subpart F of the Internal Revenue Code required that income of a controlled foreign corporation be reported by a United States corporate parent if more than 30 percent of the subsidiary's income was derived from certain transactions with related companies located outside the country of the subsidiary's incorporation. Int. Rev. Code § 954(b)(3)(A). Vetco took the position in its returns for fiscal 1972 and later years that VIAG's income did not meet the 30 percent requirement and therefore need not be reported by Vetco. The Internal Revenue Service's audit of Vetco's re-

turns for 1972 through 1975 has led to controversy over whether Vetco correctly treated certain companies as unrelated and whether VIAG's income from sales to these companies and others was correctly reported. In February 1977, the audit was broadened to include a criminal tax fraud investigation.

In October 1977, the IRS issued to Vetco a summons, which is that agency's form of administrative subpoena. Int. Rev. Code §§ 7601 *et. seq.* It demanded the production at the IRS office in Oxnard, California, of all the business records of Vetco and its subsidiaries, including all the business records of VIAG in Switzerland. These Swiss papers consist of about 500,000 separate documents and measure approximately 300 linear feet. They contain references to the names of about 3,000 unrelated third parties. Vetco has been advised by Swiss counsel, and it has never been contested, that these records contain "manufacturing or business secret[s]" within the meaning of Article 273 of the Swiss Penal Code (p. 22a, *infra*), which makes it a crime, punishable by fine and imprisonment, to "make[ ] available" any such secrets to, among others, "a foreign governmental agency." The secrets recorded in VIAG's documents are not only its own but also those of third parties.

Except for documents claimed to be privileged or to have work-product protection, Vetco offered to make available for on-site inspection all domestic and foreign records other than the Swiss records. As for the Swiss records, Vetco offered to try to resolve the problem created by the Swiss criminal statute. The IRS would not agree to anything less than full production of all foreign documents in Oxnard but did agree to on-site inspection of domestic records.

IRS summonses are not self-enforcing. Consequently, because the summons had not been complied with to the

full satisfaction of the IRS, in March 1978 the agency initiated a proceeding in the district court to enforce the summons insofar as it called for production of the foreign records and of the documents that Vetco had withheld as privileged or protected. The district court upheld the claims of privilege as to some documents and not as to others. It required production of the foreign documents, other than those in Switzerland, for inspection where the documents were located, as Vetco had originally agreed. The foreign on-site inspection took place in the summer of 1979. As a result of the on-site inspections, domestic and foreign, 60 to 70 percent of the Swiss records were actually produced in the form of copies in other Vetco offices.

The district court ordered Vetco on November 5, 1979, to produce the Swiss documents themselves but did not indicate how, when or where the production was to be made. In response, Vetco agreed to make VIAG's records available to the IRS in Switzerland for inspection and copying, relying upon its understanding that the IRS had made appropriate contacts with the Swiss government and upon the fact that the district court had required nothing more than on-site availability of other foreign documents. Vetco thought its proposal had been accepted, but the IRS said that there had been a misunderstanding. The IRS then asked the court to order the immediate production of VIAG's original records in Oxnard and to impose monetary sanctions for any failure to produce. On March 28, 1980, the district court ordered Vetco to produce all original Swiss records in Oxnard by April 11 or pay a fine of $500 a day. Vetco's request for time to obtain consents from third parties whose secrets it might be disclosing was denied. Neither in enforcing the summons nor in fixing a deadline for compliance and imposing sanctions for non-compliance did the district

court make findings of fact or draw conclusions of law. This was despite the fact that the court received quite a full evidentiary presentation and legal argument. The critical issue was whether Swiss law prohibited production of the documents.

The key statutory provision is Article 273 of the Swiss Penal Code, mentioned above. It reads in pertinent part:

> "Whoever makes available a manufacturing or business secret to a foreign governmental agency or a foreign organization or private enterprise or to an agent of any of them . . . shall be subject to imprisonment and in grave cases to imprisonment in a penitentiary.
>
> The imprisonment may be combined with a fine." (P. 22a, *infra*.)

On Vetco's side there was evidence in the form of affidavits from two Swiss lawyers and a letter from the Swiss Attorney General, all of which concluded that it would be illegal under Swiss law to transmit VIAG's business records to the United States tax authorities, unless VIAG first obtained the consents of any third parties concerned. The government submitted a legal opinion of a representative of the Swiss Federal Attorney. He did not disagree with Vetco's affiants, but he mentioned the possibility of a defense of duress under Article 34 of the Swiss Penal Code. He said that

> "these prerequisites according to Art. 34 Swiss Penal Code are seldom fulfilled, so that the action on the basis of this emergency article remains unpunished only in very exceptional cases."

In addition, when the case reached the court of appeals, Vetco presented to the court a letter dated May 13, 1980, from the Embassy of Switzerland to the United States Government, which is quite forthright in its assertion

that in the circumstances of the case there would be at least preliminary criminal proceedings under Article 273.

> "Without wishing to interfere in this pending appeal procedure, the Embassy of Switzerland would like to point out that in case the respondent, in spite of the lack of consent by interested third persons, were to disclose business or manufacturing secrets as mentioned above, the Swiss Attorney General would have to initiate a judiciary investigation, since such an act falls within a class of crime in which the prosecutor must act independently, even though he has not received any complaint from a third person."

Vetco also testified to its continuing willingness to permit an on-site examination of the documents and offered alternative ways of satisfying the IRS' professed need for the information to be found in the 500,000 documents:

(a) arranging to obtain the consents of all third parties;

(b) copying the documents and masking the names of non-consenting third parties on the copies;

(c) obtaining an opinion from the Swiss courts as to the legality of producing the documents through the use of a letter rogatory; and

(d) using the exchange of information provisions of the Swiss-United States Tax Treaty.

The IRS found these alternatives unsatisfactory for various reasons. Most of the objections were based on the opinion that Swiss law or the attitude of Swiss authorities would bar effective pursuit of the alternative.[2] The IRS

[2] Copying and masking was objected to on the ground that, if two Swiss corporations that the IRS considered critical to the transactions it was investigating did not consent, information concerning them would not be revealed. Vetco has subsequently obtained the consent of these two companies, and documents relating solely to them have been produced in Los Angeles. Vetco indeed is regularly producing documents from Switzerland the disclosure of which poses no threat of prosecution because necessary consents have been obtained.

made no showing that it had tried to pursue any of them or had met in this case the kind of resistance that it professed to anticipate from the Swiss authorities.

Vetco appealed both from the district court's order enforcing the summons and from its order imposing sanctions. The court of appeals, ruling that one of the two orders at least was a final order (p. 4a, n.3, *infra*), affirmed on the merits. The orders have been stayed pending appeal and the filing and disposition of this Petition.

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question of law in a way that is inconsistent with the decision of this Court in the well-known *Interhandel* case, *Societe Internationale pour Participations Industrielles et Commerciales* v. *Rogers*, 357 U.S. 197 (1958). The question is of a kind that has enormous currency as the demands of United States law grow and business enterprises subject to that law increasingly expand their activities beyond the national borders. More and more frequently, such enterprises confront the dilemma of conflicting legal demands upon them. In *Interhandel* this Court addressed the specific issue of one such dilemma: United States compulsory process that cannot be complied with except at the cost of offending another sovereign's law. It set forth principles that have endured for resolving that dilemma. The court below departed from them.

The departure from the salutary principles of *Interhandel* comes at a time when resentment on the part of other countries of what they view as efforts to give extraterritorial reach to both our substantive law and our process is rife.[3] The conduct that aroused resentment is the subject

[3] *See, e.g.*, Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 2 W.L.R. 81 (H.L.); In re Westinghouse Elec. Corp. & Duquesne Light Co., 16 Ont.2d 273 (1977); *see also* nn.4, 5, 13, and 14, *infra*.

of a resolution recently adopted by the House of Delegates of the American Bar Association[4] and of extensive commentary in scholarly journals.[5] It is the subject also of diplomatic representations and sometimes of intervention in United States judicial proceeding by or on behalf of foreign governments.[6] The principles of *Interhandel* counsel our courts to draw away from the confrontation with the demands of other countries' law when they reasonably and fairly can. Departure from those principles can only aggravate the resentment of the United States in the international community. This case, presenting what Vetco submits is a glaring departure from those principles, is an appropriate vehicle for re-examination of the broad issue posed in *Interhandel* in the more urgent context of a quarter century later.

[4] The resolution, adopted on August 11, 1981, recommends that any federal agency be required to consult with the State Department (or another agency designated by the President), and foreign governments where appropriate, before taking any extraterritorial enforcement or regulatory action, including the issuance of subpoenas.

[5] *See, e.g.*, Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 Am. U. L. Rev. 323 (1981); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 Nw. U.L. Rev. 487 (1969); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 Yale L.J. 612 (1979); Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 Va. J. Int'l L. 747 (1974).

[6] *See, e.g.*, Note to the U.S. State Department from the French Embassy Regarding the FTC Investigation of SGPM, 10 January 1980, reported in relevant part in FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1306 n.18 (D.C. Cir. 1980); In re Uranium Antitrust Litigation, 617 F.2d 1248, 1253 (7th Cir. 1980); In re Uranium Antitrust Litigation (Rio Algom), 480 F. Supp. 1138, 1149 (N.D. Ill. 1979).

1. In *Interhandel* a Swiss company filed a complaint after the war alleging that it was the owner and therefore entitled to the return of assets of which the Alien Property Custodian had taken control during the war on a finding that they were owned by or held for the benefit of a German company. The government, defending the suit, moved for the production of documents located in Switzerland that it believed went to the existence of a conspiracy to conceal the German ownership of the assets. The motion was granted.

The plaintiff company invoked the same Article 273 of the Swiss Penal Code with which this case is concerned as a reason why it could not comply with the production order. The Swiss Federal Attorney, acting in response to the production order to safeguard the policy of Article 273, forbade the transfer of the records. The government moved to dismiss the complaint for failure to make discovery. A master was appointed to examine the facts. The district court confirmed his finding that the plaintiff had acted in good faith and without colluding with the Swiss authorities but nevertheless dismissed the complaint on the ground that "Swiss law did not furnish an adequate excuse for petitioner's failure to comply with the production order, since petitioner could not invoke foreign laws to justify disobedience to orders entered under the laws of the forum . . . ." 357 U.S. at 201-02.

The court of appeals affirmed, but this Court, reversing the dismissal of the complaint, took quite a different view of the deference that is owed by a United States court sitting as the forum to the conflicting commands of a foreign sovereign. A Court unanimous except for a former Attorney General who did not sit, and speaking with the authority of an opinion by Justice Harlan, ruled thus:

> "The findings below, and what has been shown as to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Id.* at 211.

Interhandel, narrowly, concerned the proper construction of discovery and discovery-sanction provisions of the Federal Rules of Civil Procedure, although the constitutional guarantee that no person may be deprived of property without due process of law was in the very close background, *see id.* at 209-12. The opinion, however, has been read, and quite correctly, as expressing this Court's views on the broad issues of fairness and international comity that are presented whenever a person is subjected to conflicting demands of the laws of two nations.

2. Those views were not respected here. Instead, the court below purported to distinguish *Interhandel*. It did so in the familiar way of a court that would confine an unwelcome precedent within that tiny area known as "its own facts."

Some of the purported grounds of distinction are, with all respect, so tenuous that it is hard to take them seriously. Surely, in our system of precedent, it is not relevant that we have here an IRS summons and in *Interhandel* had a civil discovery order (p. 10a, *infra*); or that, as a civil plaintiff, the Swiss company in *Interhandel* ran the risk of not being able to produce documents helpful to its case (as might also be true of Vetco) or of having

adverse inferences drawn from its failure to produce. (P. 10a, *infra; see* 357 U.S. at 212-13.)[7]

The other stated grounds of distinction stand no better. The court emphasized that in *Interhandel* there were findings that the plaintiff had acted in good faith. (P. 9a, *infra.*) And indeed this Court did lay its own emphasis on that fact. 357 U.S. at 201, 209, 211. But it comes with singularly ill grace for the court below to place as much emphasis as it did on the distinction that no such finding was made in this case. No findings were made by the district court at all — and with the court of appeals' approval! Vetco argued below (and still contends) that in a case such as this one, with serious international implications, findings should have been made, whatever may be the rule in the typical summary summons enforcement case.[8] Certainly the master's careful findings were impor-

[7] In one respect, the opinion below blatantly misreads *Interhandel.* Before coming to the issue whether dismissal of the complaint for failure to comply with an order to produce documents was allowable, the Court addressed the anterior contention of Interhandel that no such order should have been issued because it did not "control" the documents within the meaning of the relevant provision of the Rules of Civil Procedure. It was in deciding that issue *against* Interhandel that the Court made comments, which were quoted by the court below as support for its decision not to follow the main ruling in the case (p. 9a, *infra*), to the effect that its "ruling [that Interhandel had sufficient control of the documents to be amenable to a production order under the rule] would [not] apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control." 357 U.S. at 205-06. The Court did not qualify in any remotely similar way its main ruling, which was that, despite being technically in control of the documents, the Swiss plaintiff was excused from compliance with the order to produce them because of the "fear of criminal prosecution."

[8] Administrative subpoena enforcement proceedings are to be conducted in accordance with the Rules of Civil Procedure save as a district court by general rule or order in a particular proceeding provides

tant to the decision in *Interhandel*.[9] And here, on the face of things, Vetco has made "extensive efforts at compliance" comparable to those in *Interhandel*. It has produced for inspection all that the IRS asked for other than privileged documents, and as a result the IRS has seen copies of 60 or 70 percent of the Swiss records. Moreover, Vetco consulted with Swiss counsel and Swiss government officials in attempting to resolve the problem, and it volunteered to try to obtain the necessary consents and to produce masked documents where consents could not be obtained (p. 6, *supra*). Good faith is not determined by whether there has been strict compliance with a document production order but by whether there have been fair efforts at compliance. *See In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998 (10th Cir. 1977).

Yet, the court of appeals scarcely mentioned these efforts in this case — except to disparage some of them in another part of its opinion as offering inadequate alterna-

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otherwise. *See* Fed. R. Civ. P. 81(a)(3). In this case there is no district court rule of general applicability and the court made no special order for this case freeing itself of the requirement that it make findings of fact and draw conclusions of law, *see* Fed. R. Civ. P. 52(a). The court of appeals said that was all right because the entry of such an order would have been a mere formality and, moreover, all the issues are issues of law. (Pp. 4a-5a, *infra*.) One can only wonder, then, at the high importance that court apparently placed on the lack of a factual finding of good faith as a predicate for its ultimate conclusion of law.

[9] *See also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979), where the court held that it was error to dismiss a complaint without the preparation of a record allowing for an evaluation of the factors counseling for and against the exercise of jurisdiction over an alleged antitrust violation occurring outside the United States.

tives to full compliance. (Pp. 15a-16a, *infra*.) For lack of the finding on good faith that it did not require (note 8, *supra*), the court of appeals looked to an offhand comment by the presiding district judge from the bench. (P. 9a, n.6, *infra*.) The substitute will not do. If the good faith of a party invoking the threat of foreign law is as important as the court below made it out to be, the issue deserves the reasoned consideration of the evidence that the making and review of findings demand and not mere reference to an offhand remark from the bench, made for all one knows in the heat of a crowded, taxing court day.

Next, the court of appeals said that this case differed from *Interhandel* because there the Swiss government had enjoined the transfer of the documents in question. That is of course true, but the injunction — termed "confiscation" in Swiss law — was not material to the decision. This Court said so. The injunction was apparently relied upon principally by the plaintiff for its unsuccessful argument that it did not "control" the documents. (Note 7, *supra*.) This Court said that "[t]he 'confiscation' . . . adds nothing to the dimensions of the problem under consideration, for possession of the records stayed where it was and the possibility of criminal prosecution for disclosure was of course present before the confiscation order was issued." 357 U.S. at 204. It was the "criminal sanctions" applicable to one who might have produced the records, *id.*, and the "fear of criminal prosecution," *id.* at 211, on which the Court based its rulings that, though Interhandel controlled the records, it was to be excused from producing them.

There is the same threat of criminal prosecution here. The court of appeals said that there was no finding to that effect (Pp. 9a-10a, *infra*), but, again, the remark seems disingenuous, given the court of appeals' knowledge

that, with its blessing, the district court made no findings on any subject. In any event, as the court correctly noted (p. 5a, *infra*), under the liberating reign of the new Rule 44.1 (p. 21a, *infra*), issues of foreign law are issues of law. This must mean, among other things, that an appellate court is as competent to decide them as a trial court, drawing on all available sources of enlightenment. Nevertheless, the court of appeals made no finding — drew no conclusion — of its own, even though there were ample record and extra-record sources of enlightenment available to it. All, we submit, attested to the reality of the danger of criminal prosecution, including the flat representation of the Swiss Embassy that any disclosure, without consent, of third parties' business secrets would result in a judicial investigation (p. 6, *supra*).

In the face of that representation and the affidavit evidence on Swiss law, the court made only equivocal statements that it was not persuaded that Article 273 poses "a great danger" to Vetco and that Vetco had not shown "a substantial likelihood of a successful Swiss prosecution." (Pp. 13a, 17a, *infra.*) For support of its expressed doubts it seized, for one thing, on the possibility of a defense of duress. But, as we have seen (p. 5, *supra*), the Swiss lawyer who raised that possibility on the government's behalf discounted the possibility because the defense is available "only in very exceptional cases." And in any event, the possibility of raising a defense to a criminal charge does not eliminate the fear of criminal prosecution. It was the fear of prosecution not the "likelihood of a successful . . . prosecution" that the Court held in *Interhandel* constituted an excuse for a failure to produce documents.

The court of appeals also said that there was "no evidence that unrelated third parties with an interest in the

confidentiality of the summoned records would object to production." (P. 13a, *infra.*) But the court itself did not take that remark seriously because later in its opinion it rejected as inadequate Vetco's offer to obtain third-party consents as an alternate means of production. (P. 15a, *infra.*)

Thus, on analysis there is no sound basis for any doubt on the court's part that there was a real danger of prosecution. In those circumstances, and in the absence of any finding (or evidence) that Vetco colluded with Swiss authorities or otherwise acted in other than the best of faith in trying to comply substantially with the summons, the comment of the Court in *Interhandel* that "fear of criminal prosecution constitutes a weighty excuse for nonproduction" plainly controls the decision here.

3. For the most part, the lower federal courts have adhered to the principles of *Interhandel* in cases in which foreign criminal prosecution for the production of records abroad has been seriously threatened. *See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts Litigation,* 563 F.2d 992 (10th Cir. 1977); *In re Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962); *Ings* v. *Ferguson,* 282 F.2d 149 (2d Cir. 1960); *Federal Maritime Commission* v. *DeSmedt,* 268 F. Supp. 972 (S.D.N.Y. 1967); *cf. In re Uranium Antitrust Litigation, (Rio Algom),* 480 F. Supp. 1138 (N.D. Ill. 1979) (production ordered to sharpen issues but question of sanctions for non-production left open). But adherence has not been uniform. One court of appeals, without ever mentioning *Interhandel,* has affirmed the enforcement of a subpoena ordering a nonresident alien to testify before a grand jury in spite of the fact that testifying would subject him to criminal proceedings in his own country. *United States* v. *Field,* 532 F.2d 404 (5th Cir.), *cert. denied,* 429 U.S. 940 (1976). The court of appeals there went so far as to say that "this

court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states." *Id.* at 410.

Recently, some lower federal courts, while paying their respects to *Interhandel*, have relied more heavily on their own balancing of the factors set forth in Section 40 of the Restatement (Second) of United States Foreign Relations Law. *See In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977); *United States* v. *First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968); *American Industrial Contracting, Inc.* v. *Johns-Manville Corp.*, 326 F. Supp. 879 (W.D. Pa. 1971).

The court of appeals here used Restatement Section 40 as the framework for its independent analysis. The affirmative rule of that section is the sound one that, where inconsistent conduct is required of a person by two states' national laws, "each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction." It then sets out certain factors in the light of which that consideration is to be made.

The very first factor is the "vital national interests of each of the states." Under this heading the court of appeals here comparatively evaluated the relative interests of the United States and Switzerland, the one in enforcing income tax liability of one of its domiciliaries, the other in protecting business secrets of its domiciliaries. (Pp. 12a-13a, *infra.*) Summing up its analysis under all headings, the court concluded "that the United States has a powerful interest in obtaining the summoned documents, and that Switzerland has a small interest in insisting that they not be produced." (P. 16a, *infra.*) If not determinative, this conclusion apparently was at the very least a most significant factor in its ultimate decision.

No such comparative evaluation is called for by *Interhandel.* That a court of the United States should be invited to evaluate the strength of the policies of a foreign nation's law and compare them with the strength of forum policies is a very dubious proposition.[10] Any such evaluation is bound to appear presumptuous to a foreign sovereign. It is not self-evident that there are any rational criteria for the evaluation. If it is to be the rule that United States courts may or even must engage in that sort of evaluation, surely it is for this Court to say so and not for the lower federal courts to embark on so presumptuous and so uncertain a course on the basis only of what may now be outmoded guidance from the American Law Institute.[11]

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[10] *See* Ings v. Ferguson, 282 F.2d 149, 151 (2d Cir. 1960); In re Uranium Antitrust Litigation (Rio Algom), 480 F. Supp. 1138 (N.D. Ill. 1979).

[11] Members of the American Law Institute may be in the process of rethinking their position on the exercise of extraterritorial jurisdiction by the United States. On March 27, 1981, the Institute published a revised draft of the Restatement of United States Foreign Relations Law, parts of which seem to be directed precisely to this kind of case. *See* Tentative Draft No. 2, Restatement of the Foreign Relations Law of the United States (Revised) (March 27, 1981). The revision was debated at the Institute's meeting last May. Under § 418 of the Draft, the United States may not exercise jurisdiction to require that a foreign subsidiary controlled by a United States corporation engage in conduct prohibited in the country where it is organized or is doing business. And a comment to the section is specific that the prohibition extends to coercion of the subsidiary by commands to its United States parent. Comment *a*. Moreover, § 403 of the Draft, although drawing on the present § 40 of the Restatement (Second), relied on below, sets forth a different set of factors to guide the determination whether a state has jurisdiction as a matter of law and further provides, in § 403(3), that an exercise of jurisdiction, although reasonable under the relevant factors, may nevertheless be unreasonable if it requires a person to take action that would violate a reasonable regulation of another state.

Independently of the Restatement factors, the court considered whether there were alternative means for obtaining the documents. This could have been a fruitful inquiry, building on this Court's suggestion in *Interhandel* that on remand the district court would have "wide discretion to proceed in whatever manner it deems most effective," including options to "explore plans looking towards fuller compliance." 357 U.S. at 213. Instead, the court approached the issue with determined negativism. Several such alternatives had been suggested by Vetco, which included obtaining third party consents, the issuance of letters rogatory, use of treaty procedures, masking the names of third parties, and IRS examination of the records in Switzerland. The court found the proposals unacceptable because none of them would yield results identical to those that would be yielded by immediate production under the summons; each alternative was subject to criticism as to the burden imposed in terms of cost, delay, or effect on compliance. (Pp. 15a-16a, *infra*.) That is as much as to say that only full, literal compliance with the summons will do, regardless of the cost and regardless how little will be lost by adoption of

[12] For the use of alternative means of compliance, *see* In re Uranium Antitrust Litigation (Rio Algom), 480 F. Supp. 1138, 1148 (N.D. Ill. 1979); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Laws of the Situs*, 64 Nw. U. L. Rev. 487, 532-3 (1969); *see also* Calcutta East Coast of India and East Pakistan/U.S.A. Conference v. Federal Maritime Commission, 399 F.2d 994, 998 (D.C. Cir. 1968); Ings v. Ferguson, 282 F.2d 149, 153 (2d Cir. 1960); In re Investigation of World Arrangements, 13 F.R.D. 280, 284 (D.D.C. 1952); SEC v. Minas de Artemisa, S.A., 150 F.2d 215 (9th Cir. 1945); *see generally* Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978). (Andersen's refusal to accept consent procedure to comply with Swiss law and failure to consult with Swiss counsel in a timely way held bad faith).

an alternative.[12] No alternative means of compliance will ever qualify by that standard. That is not what Justice Harlan had in mind. It is far even from the spirit of Section 40 of the Restatement, which specifically counsels moderating the exercise of enforcement jurisdiction.

4. As indicated at the outset, the question presented is of great current importance. The willingness of American courts in recent years to order the production of documents from abroad has, as we have said, aroused international resentment. The cases are numerous. *See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts Litigation,* 563 F.2d 992 (10th Cir. 1977); *In re Uranium Antitrust Litigation (Rio Algom),* 480 F.Supp. 1138 (N.D. Ill. 1979); *see also FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson,* 636 F.2d 1300 (D.C. Cir. 1980). Protests have made clear that foreign governments consider such production orders as infringements of sovereignty and violations of international law.[13] In addition, a number of foreign countries, including the United Kingdom, Australia, France, and Canada, as well as two Canadian

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[13] One scholar summarized his review of the controversies as follows:

> "From the many protests against the attempts of United States courts to secure documents which are located abroad, one thing seems quite clear: every foreign government considers this attempt as an infringement upon its sovereignty and as beyond the jurisdiction of the United States according to international law." Onkelinx, *supra* n.12, at 499.

[14] *See* Protection of Trading Interests Act, 1980, c. 11 § 2, 20 Mar. 1980 (U.K.); Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Austl. Acts No. 121, § 5 (Australia); French Law 80-538, Journal Officiel de la Republique Francaise (17 July 1980); Atomic Energy Control Act, 1970, Can. Rev. Stat. c. A19 and Uranium Information Securities Regulations, Stat. O. & R. 76-644 (1976) (Canada); Business Records Protection Act, 1947, Ont. Rev. Stat. c. 54 (1970) (Ontario); Business Concerns Records Act, 1964, Que. Rev. Stat. c. 278 (1964) (Quebec).

provinces have responded by the passage of non-disclosure or "blocking" statutes.[14] *See FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson, supra* at 1326 n.145 (D.C. Cir. 1980); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation,* 88 Yale L.J. 612, 613 nn.4-5 (1979). The American Bar Association has become concerned enough to speak out. This case affords the Court the opportunity to act in the interest of international comity, as well as fairness to parties situated as Vetco is. The opportunity should not be forgone.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA and ROBERT R. HANDLEY, Special Agent of the Internal Revenue Service,
Petitioners-Appellees,

v.

VETCO INC., formerly Vetco Offshore Industries and Subsidiaries; RONALD G. CULLIS, Financial Vice President and/or LARRY R. LANGDON, Secretary,
Respondents-Appellants.

UNITED STATES OF AMERICA and ROBERT R. HANDLEY, Special Agent of the Internal Revenue Service,
Petitioners-Appellees,

v.

DELOITTE HASKINS & SELLS, Certified Public Accountants,
Respondent-Appellant.

Nos. 79-3756 to 79-3758, 79-3786, 80-5276 and 80-5327.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 17, 1980.

Decided May 11, 1981.

Appeal from the United States District Court for the Central District of California.

Before SKOPIL and NELSON, Circuit Judges, and EAST,* District Judge.

SKOPIL, Circuit Judge:

INTRODUCTION

In October 1977 the Internal Revenue Service ("IRS") issued summonses to Vetco, Inc. ("Vetco"), its accountants, Deloitte Haskins & Sells ("DH&S"), and its lawyers, Kindel & Anderson. The summonses requested the books and

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

records of Vetco and its overseas subsidiaries for 1971-1976, and tax accounting reports prepared by DH&S.

DH&S and Vetco resisted the summonses on the ground that compliance would require them to violate Swiss law. The district court enforced the summonses. When DH&S and Vetco did not comply, the district court imposed contempt sanctions. DH&S and Vetco appeal from both the enforcement and sanctions orders. We affirm.

FACTS

Vetco is an American corporation manufacturing offshore drilling equipment. Vetco International, A.G. ("VIAG"), is a wholly-owned Swiss subsidiary of Vetco. DH&S is an American firm of certified public accountants, which was retained by Vetco to audit its accounts. Deloitte Haskins & Sells, A.G. ("DH&S Zurich") is the Swiss affiliate of DH&S.

[1] In the early 1970's VIAG became a wholly-owned subsidiary of Vetco. This rendered Vetco subject to Subpart F of the Internal Revenue Code ("the Code") with respect to the reporting of VIAG's income. *See* I.R.C. §§ 951-64.[1] The IRS asserts that Vetco attempted to avoid the application of Subpart F. Instead of shipping its products to VIAG for sale, Vetco shipped them to two Swiss corporations, Wiedex, A.G. and Zanora, A.G. Those companies transferred the goods to VIAG for sale. Under this arrangement, Vetco avoided Subpart F income because VIAG's income was no longer derived from transactions with a related corporation located outside

[1] During the years relevant to this appeal, Subpart F provided that income of a controlled foreign corporation was to be reported on the domestic parent corporation's federal income tax return if thirty percent of the subsidiary's income was derived from transactions with related corporations located outside of the country of the subsidiary's incorporation. I.R.C. §§ 954(b)(3)(A) (1954) (amended 1975), 954(d)(1). The thirty percent minimum was reduced to ten percent by the Tax Reduction Act of 1975. I.R.C. § 954(b)(3)(A) (1975).

Switzerland. The IRS alleges that Wiedex and Zanora served no non-tax commercial function.

DH&S conducted a comprehensive tax survey for Vetco in 1976. It concluded that Vetco might have been required to report Subpart F income for the tax years 1971-1976. It recommended voluntary disclosure to the IRS. Kindel & Anderson provided certain information to the IRS in August and September 1976.

The information revealed led the IRS to bring its Criminal Investigation Division into the case to investigate the possibility of fraud. Relations between the IRS and Vetco deteriorated. In the absence of voluntary disclosure, the IRS issued summonses to Vetco, DH&S, and Kindel & Anderson. Pursuant to I.R.C. § 7609(b)(2), Vetco ordered DH&S and Kindel & Anderson not to comply with the summonses.

PROCEEDINGS BELOW

[2] The IRS moved to enforce the summonses. The district court ruled that the summonses had been issued for proper purposes and ordered DH&S to produce its tax accrual records. It held that Kindel & Anderson was not required to produce the DH&S tax survey.[2] In November 1979, following special briefing and hearings on the effect of Swiss law, the district court ordered Vetco and DH&S to produce their Swiss records. The court did not enter findings of fact or conclusions of law. Vetco and DH&S filed notices of appeal. The district court refused to stay its order pending appeal.

Vetco and DH&S did not comply with the district court's order. In December 1979 the IRS moved to have them held in contempt and to have sanctions imposed. The district court issued a show cause order. After hearings, in March 1980 the

[2] The IRS moved in the district court for reconsideration of the decision that Kindel & Anderson would not be required to produce the DH&S tax survey. The summons issued to Kindel & Anderson is therefore not before this court.

district court ordered Vetco and DH&S to produce the Swiss records in Los Angeles by April 11, 1980, or be fined $500 per day as a sanction. This court consolidated the appeals of Vetco and DH&S from both the enforcement and sanctions orders and granted a stay pending appeal.[3]

ISSUES

1. Did the district court err in failing to enter findings of fact and conclusions of law?
2. Does the Swiss-U.S. tax treaty preclude the use of IRS summonses to obtain records of Swiss subsidiaries?
3. Does possible criminal liability in Switzerland preclude enforcement of the summonses and imposition of contempt sanctions?
4. Does the district court's production order deny DH&S due process?

DISCUSSION

I. Findings of Fact and Conclusions of Law.

DH&S contends that the district court erred in failing to make findings of fact and conclusions of law supporting its order enforcing the summonses. We disagree.

[3, 4] Even if rule 52(a) of the Federal Rules of Civil Procedure requires findings and conclusions in summons en-

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[3] Because the appeals from both orders have been consolidated, there is no question that we have a final order, and that the foreign illegality defense has been properly preserved. By way of guidance, we note that the defense must be raised at the enforcement proceeding, where the summonee is entitled to "challenge the summons on any appropriate ground." *Reisman* v. *Caplin*, 375 U.S. 440, 449, 84 S.Ct. 508, 513-514, 11 L.Ed.2d 459 (1964). *See also United States* v. *Freedom Church*, 613 F.2d 316, 319 (1st Cir. 1979). The decision as to the defense is ordinarily res judicata. *See, e.g., United States* v. *Ofe*, 572 F.2d 656, 657 (8th Cir. 1978); *United States* v. *Peter*, 479 F.2d 147, 150 (6th Cir. 1973); *United States* v. *Secor*, 476 F.2d 766, 770 (2d Cir. 1973). *See also United States* v. *Asay*, 614 F.2d 655, 660 (9th Cir. 1980).

forcement and contempt proceedings, the district court could have modified that requirement by issuing an order. Fed.R.Civ.P. 81(a)(3). *See United States* v. *Church of Scientology of California,* 520 F.2d 818, 821 (9th Cir. 1975). We find no reason in this case for requiring the district court to carry out the formality of issuing an order. *See Brunswick Corp.* v. *Doff,* 638 F.2d 108, at 110-111 (9th Cir. 1981).

The function of findings and conclusions is to permit informed appellate review. 5A *Moore's Federal Practice* ¶ 52.06[1] at 2706 (2d Ed. 1980). There is no factual dispute in this case. The questions presented are whether the use of summonses is prohibited by treaty, whether Swiss law prohibits compliance with the summonses, and whether any such prohibition requires that the summonses not be enforced, or that contempt sanctions not be imposed. All of these questions are legal, including the question of Swiss law. Fed.R.Civ.P. 44.1; *Kalmich* v. *Bruno,* 553 F.2d 549, 552 (7th Cir.), *cert. denied,* 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977). The district court did not err in failing to make findings of fact and conclusions of law.

II. Effect of the Swiss-U.S. Tax Treaty and IRS Regulations.

[5-7] Vetco argues that the Swiss-U.S. Tax Treaty precludes the use of IRS summonses to obtain records held in Switzerland. It further contends that IRS regulations provide that treaty information-exchange provisions are the exclusive means of obtaining such records.

A. The Swiss-U.S. Tax Treaty.

Article XVI of the Swiss-United States Tax Treaty provides in pertinent part:

> "(1) The competent authorities of the contracting States shall exchange such information (being information available under the respective taxation laws of the contracting States) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the like in relation to the taxes which are

> the subject of the present Convention. . . . No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process.
>
> . . . .
>
> (3) In no case shall the provisions of this Article be construed so as to impose on either of the contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either contracting State or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application."

Convention on Double Taxation of Income, September 27, 1951, United States-Switzerland, 2 U.S.T. 1751, 1760-61, T.I.A.S. No. 2316.

I.R.C. § 7852(d) renders Code provisions inapplicable where their application "would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title." *See Samann* v. *Commissioner*, 313 F.2d 461, 463 (4th Cir. 1963).[4]

There is nothing in the treaty barring the use of summonses by the IRS to gather information. The treaty does not state that its procedures for the exchange of information are intended to be exclusive. There is no such indication in the treaty's legislative history. A statute and a treaty are to be read to be consistent to the greatest possible extent. *United States*

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[4] The summons power may be enlarged where "to do otherwise would negate the very purpose of the Treaty." *United States* v. *A. L. Burbank & Co.*, 525 F.2d 9, 13 (2d Cir. 1975), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2647, 49 L.Ed.2d 386 (1976). It does not appear in this case that it is necessary to limit the summons power to avoid negating the purpose of the Swiss-U.S. tax treaty. One of the purposes of that treaty is to prevent tax fraud. 2 U.S.T. at 1760. Issuance of the summons in this case will further that purpose, not negate it. *See Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 163, 61 S.Ct. 219, 226, 85 L.Ed. 98 (1940); *Cucuzzella* v. *Keliikoa*, 638 F.2d 105, at 107 n.3 (9th Cir. 1981).

v. *Lee Yen Tai*, 185 U.S. 213, 221-22, 22 S.Ct. 629, 632-633, 46 L.Ed. 878 (1902). *See also Washington* v. *Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61 L.Ed.2d 823 (1979); *Kimball* v. *Callahan*, 590 F.2d 768, 775 (9th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979).

B. IRS Regulations

IRS regulations contemplate use of summonses in international tax investigations. I Audit, Internal Revenue Manual (CCH) ¶ 4022.(10)3(2) provides, in pertinent part:

> "(c) Before any contact with a foreign organization or before any summons or presummons letter is issued to obtain information from a foreign organization which is not doing business in the United States . . . the matter must be referred to the Office of International Operations (CP:IO) for advice and assistance in accordance with IRM 42(10)(10)."

See also ¶ 4233.63(12); II Audit, Internal Revenue Manual (CCH) ¶ 42(10)(10).2(6); 5 Administrative, Internal Revenue Manual (CCH) ¶ 9265.1(1).

Vetco relies on II Audit, Internal Revenue Manual (CCH) ¶ 42(10)(10).1(4), which provides, in part: "The articles of the respective tax conventions determine the extent of information obtainable in treaty countries."

[8] That section of the manual explains to IRS employees one of several means by which the Office of International Operations can obtain records from a foreign entity. Treaty procedures are the exclusive method where the treaty so provides or where the foreign entity has no American point of contact. It is not the exclusive means of obtaining information where the treaty does not so provide and where the foreign source is a subsidiary of an American corporation. There has been no violation of IRS regulations.[5]

[5] Since we conclude that there was no violation of IRS regulations, we need not decide whether a violation would require that the sum-

III. Foreign Illegality and Summons Enforcement.

Appellants contend that compliance with the summonses would require them to violate Article 273 of the Swiss Penal Code. That article provides, in pertinent part:

> "Whoever makes available a manufacturing or business secret to a foreign governmental agency or a foreign organization or private enterprise or to an agent of any of them; shall be subject to imprisonment and in grave cases to imprisonment in a penitentiary.
>
> The imprisonment may be combined with a fine."

StGB Art. 273. The term "business secret" has been defined to include "all facts of business life to the extent that there are interests worthy of protection in keeping them confidential." *Swiss Federal Attorney* v. *A.*, 98 BGE IV 209 (September 7, 1972).

Appellants contend that *Societe Internationale Pour Participations Industrielles* v. *Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) requires that the summonses not be enforced, or that contempt sanctions not be imposed, where compliance requires a violation of foreign law. We disagree.

A. No absolute bar to enforcement and sanctions.

[9, 10] In *Societe Internationale*, a Swiss company sued to recover property seized by the United States pursuant to the Trading With the Enemy Act. The United States requested discovery of records of a Swiss banking firm that it alleged had conspired with the plaintiff. The Swiss government enjoined the plaintiff from producing the requested documents. The district court dismissed the action when plaintiff failed to produce. The Supreme Court reversed. The Court stated that "fear of criminal prosecution constitutes a weighty

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monses not be enforced. *See United States* v. *Caceres*, 440 U.S. 741, 754 & n.18, 99 S.Ct. 1465, 1473 & n.18, 59 L.Ed.2d 733 (1979); *United States* v. *Wilson*, 614 F.2d 1224, 1227 (9th Cir. 1980); *United States* v. *Equitable Trust Co.*, 611 F.2d 492, 500 (4th Cir. 1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1599, 63 L.Ed.2d 785 (1980).

excuse for non-production, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Id.* at 211, 78 S.Ct. at 1095.

Societe Internationale did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign law. The Court specifically stated that its ruling would not apply "to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control." *Id.* at 205-06, 78 S.Ct. at 1092-1093. The determination depends "upon the circumstances of a given case." *Id.* at 206, 78 S.Ct. at 1092-1093.

Societe Internationale held only that the district court could not dismiss a plaintiff's complaint for failure to comply with a discovery request where the plaintiff had made extensive good faith efforts to comply. The Court left the district court "wide discretion" to use other means of obtaining compliance, to award lesser sanctions against the plaintiff, and to draw inferences unfavorable to the plaintiff in the absence of complete disclosure. *Id.* at 213, 78 S.Ct. at 1096.

This case is not controlled by *Societe Internationale*. We have no finding that appellants have made good faith efforts to comply with the summonses.[6] *Compare Societe Internationale*, 357 U.S. at 201, 78 S.Ct. at 1090 (explicit finding by Special Master of good faith confirmed by district court). In *Societe Internationale*, the Swiss government enjoined the plaintiff from complying with the summons. *Id.* at 200, 78 S.Ct. at 1090. There has been no comparable action taken by the Swiss government in this case, even though the letters and affidavits filed reveal that the Swiss are not unaware of these proceedings. There was a finding in *Societe Internationale* that production would violate Swiss law. *Id.* at 204, 78 S.Ct. at 1092. We

[6] By contrast, the district court stated at a hearing on April 1, 1980 that the appellants were conducting "one of the greatest delaying actions of my recent memory."

have no comparable finding in this case.[7] The Court found that in *Societe Internationale* the plaintiff's inability to produce the requested documents might "prove a serious handicap" to it in attempting to make its case. *Id.* at 212-13, 78 S.Ct. at 1096. In the instant case, Vetco will gain by its inability to produce.

The document request at issue in *Societe Internationale* was a civil discovery order. The instant case turns upon an IRS summons issued pursuant to an investigation of potentially criminal conduct. Such summonses appear to serve a more pressing national function than civil discovery. Such summonses are also more widely recognized in the international community than the broad civil discovery permitted in American courts. *See In re Grand Jury Proceedings (United States* v. *Field),* 532 F.2d 404, 408 (5th Cir.), *cert. denied,* 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 292 (1976)(citing authority); Note, *Foreign Non-Disclosure Laws and Domestic Discovery Orders in Antitrust Litigation,* 88 Yale L.J. 612, 627-28 (1979).

B. Balancing competing interests — factors to consider.

[11] Courts must balance competing interests in determining whether foreign illegality ought to preclude enforcement of an IRS summons. The result in each case will turn on

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[7] In the instant case, by contrast, the district court stated at a hearing on November 15, 1979:

"I have a very serious question in my mind now whether or not the records you are talking about are indeed the sort of records that the Swiss statute was designed to protect against improper revelation. And up to this point, insofar as I am concerned, we have talked a lot of generalities, and kind of records en masse without specificity, that gives us an opportunity to test those. . . .

We have spent I don't know how many months now going into this question of Swiss law, and this threat of penal sanctions. Based on what I have before me at this point, I am now of the view that the threat of criminal sanctions by Switzerland is not as real as it was initially suggested to me to be."

the particular circumstances. *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 997 (10th Cir. 1977); *In re Grand Jury Proceedings*, 532 F.2d at 407; *Trade Development Bank* v. *Continental Insurance Co.*, 469 F.2d 35, 41 (2d Cir. 1972); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1145 (N.D.Ill. 1979); Restatement (Second) of Foreign Relations Law of the United States § 39 (1965). *See also Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 613-15 (9th Cir. 1976); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979).[8]

The factors to be considered in this balancing process are essentially those set forth in the Restatement (Second) of Foreign Relations Law § 40. That section provides:

> "Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

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[8] There is a line of cases in the Second Circuit stating that "upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures." *In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962), *quoting from Ings* v. *Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960).

These cases are distinguishable. In both *Ings*, 282 F.2d at 152-53, and *Chase Manhattan Bank*, 297 F.2d at 612-13, the summonee was not a party to the action, and there appeared to be a feasible alternative means of obtaining the documents. Moreover, the Second Circuit itself has receded from their strong language. *See Trade Development Bank*, 469 F.2d at 40-42; *United States* v. *First National City Bank*, 396 F.2d 897, 901-05 (2d Cir. 1968). Commentators have done likewise. *See, e.g.*, Restatement (Second) of Foreign Relations Law §§ 39-40; Note, *Discovery of Documents Abroad in U.S. Antitrust Litigation: Recent Developments in the Foreign Illegality Excuse*, 14 Va.J.Int'l L. 747, 752-56 & n.30 (1974).

(a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state."

Westinghouse Electric Corp., 563 F.2d at 997-99; *In re Grand Jury Proceedings*, 532 F.2d at 407-09 & n.5; *United States* v. *First National City Bank*, 396 F.2d 897, 902-05 (2d Cir. 1968). *See also Timberlane Lumber Co.*, 549 F.2d at 614-15 & nn.31-34; *Mannington Mills*, 595 F.2d at 1297-98.

1. Vital national interests.

[12] In assessing the vital national interests of each of the states, a court ought to consider the degree of difference in law or policy, and the nationality of the parties affected. *Timberlane Lumber Co.*, 549 F.2d at 614 & nn.32-33.[9]

There is a strong American interest in collecting taxes from and prosecuting tax fraud by its own nationals operating through foreign subsidiaries. Switzerland has a similar interest. *See* Convention on Double Taxation of Income, 2 U.S.T. at 1760. Yet Switzerland also has an interest in preserving the secrecy of business records. Its interest is diminished

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[9] It is important to distinguish between actions brought by the government, such as this one, and private suits. In the latter situation, "there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed." *Timberlane Lumber Co.*, 549 F.2d at 613 (footnote omitted). *See also Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977).

in this case, where the parties are subsidiaries of American corporations. *See Timberlane Lumber Co., supra.*

The Swiss Attorney General has distinguished between cases where there is a public interest in keeping information secret, and cases where only private interests are involved. In the latter type of case, Article 273 prohibits disclosure only if the party whose business secret is being divulged does not consent. Gerber, *Einige Probleme Des Wirtschaftlichen Nachrichtendienstes,* Zeitschrift Fur Schweiz 257 (1977). A representative of the Swiss Federal Attorney stated that the instant case "apparently does not concern a totally Swiss interest in confidentiality." Record, vol. 1, at 106. Thus, Switzerland's only interest is in protecting the privacy of its non-consenting domiciliaries. This interest is further diminished where the party seeking the records is the IRS, which is required by law to keep the information confidential. I.R.C. § 6103(a).

2. Extent of hardship.

[13] We are not persuaded that Article 273 poses a great danger to the appellants. The party relying on foreign law has the burden of showing that such law bars production. *Ohio* v. *Arthur Andersen & Co.,* 570 F.2d 1370, 1374 (10th Cir.), *cert. denied,* 439 U.S. 832, 99 S.Ct. 114, 58 L.Ed.2d 129 (1978); *First National City Bank of New York* v. *Internal Revenue Service,* 271 F.2d 616, 619-20 (2d Cir. 1959), *cert. denied,* 361 U.S. 948, 80 S.Ct. 402, 4 L.Ed.2d 381 (1960).

There is no evidence that unrelated third parties with an interest in the confidentiality of the summoned records would object to production.[10] An affidavit from a representative of

[10] Vetco's Swiss counsel stated that he had contacted "the previous owner of Zanora A.G. and I was told that he would *not* consent to a full divulgement [sic] of all the transactions to the U.S. authorities." (emphasis in original). Even if this hearsay statement were admissible, it would only be legally significant in the records' confidentiality, or if Zanora were independent from VIAG. The Government has alleged that it is not independent. Vetco has not produced any evidence to the contrary.

the Swiss Federal Attorney, states that where production is pursuant to an order of a United States Court enforcing an IRS summons there may be a defense to a charge of violating Article 273. Article 34 of the Swiss Penal Code provides a defense to criminal charges based upon duress. No case has been cited in which a person has been prosecuted for complying with a court order enforcing an IRS summons.

To the extent that some hardship is imposed on appellants, it was avoidable. I.R.C. § 964(c) requires an American corporation to keep records pertaining to its controlled foreign corporations sufficient to enable a determination as to whether Subpart F tax is due. Had Vetco kept a copy of such records at its offices in this country, the instant dispute would never have arisen. There would be no violation of Swiss law, and no Swiss party would have occasion to object to the disclosure.

3. Location, nationality, expectation of compliance.

Consideration of the other factors set forth by the Restatement does not alter our conclusion that the district court properly enforced the summonses and imposed contempt sanctions. The required conduct is to take place both in this country and in Switzerland. The records must be shipped out of Switzerland. Production to the IRS will take place in this country. DH&S Zurich and VIAG are Swiss corporations, but both are controlled subsidiaries of American firms.

4. Importance of the documents.

The importance of the documents to the requesting party is also a factor to be considered. Courts have refused to require production where the documents sought are largely cumulative of records already produced. *Westinghouse Electric Corp.*, 563 F.2d at 999; *Trade Development Bank*, 469 F.2d at 40-41. The IRS has shown that the documents sought are the type of records relevant to an investigation of Subpart F tax liability. Appellants have made no showing that the documents are cumulative of records already produced.

5. Availability of alternate means of compliance.

[14] We also consider whether substantially equivalent alternate means for obtaining the requested information are available. *See SEC* v. *Minas de Artemisa*, 150 F.2d 215, 218-19 (9th Cir. 1945); *Westinghouse Electric Corp.*, 563 F.2d at 997; *United States* v. *First National City Bank*, 396 F.2d at 902. Appellants contend that there are six such alternatives: obtaining consents to the disclosure, issuance of letters rogatory, use of treaty procedures, masking the name of third parties, use of an independent expert on Swiss law, and having the IRS examine the records in Switzerland. None of the proposals constitutes a substantially equivalent alternative.

Attempting to obtain consents from affected third parties is not an alternate means of production. It may limit the information obtainable by the IRS. It is not substantially equivalent because of the cost in time and money of attempting to obtain those consents.

Appellants concede that letters rogatory will not be honored in Switzerland where they seek records for litigation involving fiscal matters. The Swiss Federal Attorney has stated that tax investigations are fiscal matters, and that it would be unable to respond favorably to a letter rogatory.

In the Swiss-U.S. Tax Treaty, Switzerland reserved the right not to transmit business secrets pursuant to the treaty's information exchange provisions. There is also precedent indicating that the Swiss will not provide legal assistance in cases of tax fraud. *X & Y Bank* v. *The Swiss Federal Tax Administration*, 76-1 U.S.T.C. ¶ 9452 at 84,213 (Swiss Fed. Sup.Ct. May 16, 1975).

Masking the names of third parties is not a substantially equivalent alternative since the identities of the third parties is relevant to Subpart F taxation. *See* I.R.C. § 954.

Use of an independent expert on Swiss law is also not an alternative means of production. An expert could only give an opinion as to what documents could legally be produced and

what documents could not. Use of an expert might not be permissible under Articles 271 and 273 of the Swiss Penal Code. Court appointment of the expert might make that person an agent of the United States government and therefore prohibited from examining the documents.

Examination in Switzerland is not a substantially equivalent alternative. The IRS is prohibited by Article 271 of the Swiss Penal Code from examining records in Switzerland. The very act of examining the records is criminal under Article 271. This contrasts with Article 273, which makes production criminal only if independent third parties object, and only if there is no defense based on duress.

We conclude that the United States has a powerful interest in obtaining the summoned documents, and that Switzerland has a small interest in insisting that they not be produced. Appellants have not shown that production pursuant to a court order enforcing an IRS summons would impose a significant hardship on them.

IV. The Enforcement Order.

A. Due process

[15] DH&S contends that it has been denied due process because the district court's production order directed it to produce "all" records described in the summons. The show cause order had only specified the documents held in Switzerland. The IRS concedes that the district court's order encompassed only those documents located in Switzerland. We interpret the district court's order to include only those documents located in Switzerland. When so interpreted, it does not deprive DH&S due process of law.

B. Production in Los Angeles

[16] Vetco contends that the district court erred in requiring it to produce its Swiss records in Los Angeles. The terms of an enforcement order rest within the discretion of the district court. *United States* v. *United Mine Workers*, 330

U.S. 258, 304, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947). Given the previous difficulties of securing production voluntarily, and the infeasibility of on-site inspection, the district court did not abuse its discretion by ordering Vetco to produce documents in Los Angeles.

CONCLUSION

The district court did not err in failing to enter findings of fact and conclusions of law. The Swiss-U.S. tax treaty does not preclude use of IRS summonses to obtain records of Swiss subsidiaries of American firms. Possible criminal liability in Switzerland does not preclude enforcement and sanctions. Application of a balancing approach in this case favors enforcement and sanctions. The interest of the United States in enforcement of the summons outweighs the contrary Swiss interest, and appellants have not shown a substantial likelihood of a successful Swiss prosecution.

The orders appealed from are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DC No. CV 78-1179-LEW

Nos. 79-3756, 79-3757
79-3758, 79-3786
80-5276, 80-5327

UNITED STATES OF AMERICA and ROBERT R. HANDLEY, Special Agent of the Internal Revenue Service,
Petitioners-Appellees,

v.

VETCO INC., formerly Vetco Offshore Industries and Subsidiaries; RONALD G. CULLIS, Financial Vice President and/or LARRY R. LANGDON, Secretary,
Respondents-Appellants.

ORDER

Appeal from the United States District Court
For the Central District of California
Laughlin E. Waters, District Judge, Presiding.

Before: SKOPIL and NELSON, Circuit Judges, and EAST, District Judge*

The panel has voted to deny the petition for rehearing. Judges Skopil and Nelson voted to reject the suggestion for rehearing en banc, and Judge East recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED July 17, 1981
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

Rule 44.1 of the Federal Rules of Civil Procedure provides:

RULE 44.1

DETERMINATION OF FOREIGN LAW

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Rule 52(a) of the Federal Rules of Civil Procedure provides:

RULE 52.

FINDINGS BY THE COURT

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 81 (a) (3) of the Federal Rules of Civil Procedure provides:

RULE 81

APPLICABILITY IN GENERAL

(a) To what proceedings applicable.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, §159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

Article 273 of the Swiss Penal Code provides:

ECONOMIC INTELLIGENCE

"Whoever searches for a manufacturing or business secret in order to make it available to a foreign governmental agency or to a foreign organization or private enterprise or to the agent of any of them;

Whoever makes available a manufacturing or business secret to a foreign governmental agency or a foreign organization or private enterprise or to an agent or any of them;

shall be subject to imprisonment and in grave cases to imprisonment in a penitentiary.

The imprisonment may be combined with a fine."

(Translation of Dr. Peter Hafter, Staehelin Hafter & Partner, Bleicherweg 58, 8027 Zurich.)

Supplemental Brief

Office - Supreme Court, U.S.
FILED
NOV 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VETCO INC.; RONALD G. CULLIS, FINANCIAL VICE PRESIDENT, and/or LARRY R. LANGDON, Secretary,

Petitioners,

v.

UNITED STATES OF AMERICA and ROBERT R. HANDLEY, Special Agent of the Internal Revenue Service,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

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November 1981
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TABLE OF CONTENTS

	Page
FACTS	2
DISCUSSION	2

TABLE OF AUTHORITIES

CASES:	Page
Abel v. *United States*, 362 U.S. 217 (1960)	2
Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	6
Donaldson v. *United States*, 400 U.S. 517 (1971)	2, 3
Kyriaco v. *United States*, 401 U.S. 922 (1971)	3, 5
Reisman v. *Caplin*, 375 U.S. 440 (1964)	2
United States v. *Billingsley*, 469 F.2d 1208 (10th Cir. 1972)	4
United States v. *Cromer*, 483 F.2d 99 (9th Cir. 1973)	3, 6
United States v. *Garrett*, 571 F.2d 1323 (5th Cir. 1978)	3
United States v. *Kyriaco*, 326 F.Supp. 1184 (C.D. Cal. 1971)	5
United States v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978)	2, 3, 5
United States v. *Marine Midland Bank of New York*, 585 F.2d 36 (2d Cir. 1978)	5
United States v. *Monsey*, 429 F.2d 1348 (7th Cir. 1970)	4
United States v. *Moriarty*, 435 F.2d 347 (7th Cir. 1970)	4
United States v. *Ortiz*, 422 U.S. 891 (1975)	6
United States v. *Powell*, 379 U.S. 48 (1964)	5
United States v. *Rosinsky*, 547 F.2d 249 (4th Cir. 1977)	3

IN THE

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VETCO INC.; RONALD G. CULLIS, FINANCIAL VICE PRESIDENT, and/or LARRY R. LANGDON, Secretary,

Petitioners,

v.

UNITED STATES OF AMERICA and ROBERT R. HANDLEY, Special Agent of the Internal Revenue Service,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

On September 2, 1981, after the petition for certiorari was filed, the Internal Revenue Service recommended to the Department of Justice that criminal proceedings be instituted against petitioner Vetco Inc. This action, we submit, makes appropriate the presentation of the following additional question.

> Whether an Internal Revenue Service summons to produce documents is vitiated by an IRS recommendation of prosecution after the summons is issued by the agency but before there is a perfected judicial enforcement order.

FACTS

As stated in the petition, the Revenue Service issued to Vetco in 1977 a summons calling for the production of all business records of Vetco and its subsidiaries. When Vetco did not comply with the summons to the Service's full satisfaction (for reasons that underlie the question stated in the petition), the Service initiated a district court enforcement proceeding. The district court ordered Vetco to produce the documents and prescribed sanctions prospectively for non-production. This order has been stayed. The court of appeals affirmed on May 11, 1981. In August, following the denial of a petition for rehearing, the petition for a writ of certiorari was filed. On September 2, 1981, the Service recommended to the Department of Justice that a criminal prosecution of Vetco be undertaken that relates to the subject matter of the summons. (Appendix A hereto.)

DISCUSSION

Vetco submits that the IRS summons addressed to it and two officers, even if enforceable at the time proceedings were instituted, is now unenforceable because the IRS has now recommended criminal prosecution to the Department of Justice. This Court has consistently held that an administrative summons will not be enforced where "the material is sought for the improper purpose of attaining evidence for use in a criminal prosecution." *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). *See Abel* v. *United States*, 362 U.S. 217, 226 (1960).

It is clear that a summons may not be issued after a recommendation for criminal prosecution has been made. That is established by *Donaldson* v. *United States*, 400 U.S. 517, 536 (1971). The Court there stated that "an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." Seven years later, in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978), the Court elaborated on *Donaldson*.

> "[S]everal requirements emerge for the enforcement of an IRS summons. First, the summons must be issued before the Service recommends to the Department of Justice that a criminal prosecution, which reasonably would relate to the subject matter of the summons, be undertaken. Second, the Service *at all times* must use the summons authority in good-faith pursuit of the congressionally authorized purposes of § 7602." (Emphasis added.)

Neither *Donaldson* nor *LaSalle* directly considered whether a summons issued before a recommendation of prosecution can be enforced after such a recommendation is made. The question was presented but not decided in *Kyriaco* v. *United States*, 401 U.S. 922 (1971). In that case, a petition for certiorari was filed asking for review of a lower court decision to enforce a summons (which had meanwhile been stayed). The petition was held to await the decision in *Donaldson*. After the opinion in *Donaldson* was issued, petitioners informed the Court that a recommendation of prosecution had been made since the petition was filed. The Court entered this order:

> "Certiorari denied without prejudice, however, to petitioners' making their respective applications, if they so choose, to the District Court for such relief, if any, as may be appropriate in light of developments occurring since petition for writ of certiorari was filed in this Court."

The question has not returned to this Court since. The courts of appeals have taken diverse views. Three, including the Ninth Circuit, have relied rather mechanically and literally, without regard to context, on the Court's language in *Donaldson*, holding that the validity of a summons is tested solely as of the date of issuance. *United States* v. *Cromer*, 483 F.2d 99, 101 (9th Cir. 1973); *United States* v. *Rosinsky*, 547 F.2d 249, 254 (4th Cir. 1977); *United States* v. *Garrett*, 571 F.2d 1323, 1327 (5th Cir. 1978). Other courts of appeals have paid more heed to the policy of ensuring that administrative summonses are not

abused by being made to serve the interests of criminal law enforcement rather than the enforcement of civil tax liability. In *United States* v. *Monsey*, 429 F.2d 1348 (7th Cir. 1970), the issue was whether the taxpayer who had received a summons should be allowed to inquire by way of discovery in an enforcement proceeding into the Service's purpose in issuing the summons. The court ruled that intervening events, particularly the commencement of a criminal prosecution, were relevant to that issue. Noting that an indictment had been handed down after the summons had been issued, the court stated:

> "Clearly, enforcement of the summonses under the present circumstances would serve primarily as an aid to the current criminal prosecutions. . . . Events subsequent to administrative issuance may change circumstances to such an extent that enforcement of a summons may bring about improprieties. Such equitable considerations demand that the court consider intervening occurrences as well as the status quo at the date of issuance." 429 F.2d at 1351.[1]

In *United States* v. *Billingsley*, 469 F.2d 1208 (10th Cir. 1972), the Tenth Circuit, remanding an enforcement order on a ground not relevant here, stated that on remand "the district court should also consider any new developments subsequent to appellants' notice of appeal such as the institution of a criminal prosecution of [the taxpayer] *or the referral of his case to the Department of Justice*." 469 F.2d at 1210 (emphasis added).

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[1] The Seventh Circuit's opinion later the same year in United States v. Moriarty, 435 F.2d 347 (7th Cir. 1970), is not inconsistent with *Monsey*. *Moriarty* dealt with the refusal of a corporate officer to turn over summoned corporate records. The officer argued that such records would aid the government in a criminal proceeding pending against him as an individual. The court enforced the summons, stating that "[t]he audit of the corporation's records need not wait final disposition of the criminal proceedings against the appellant." 435 F.2d at 349. This double defendant situation did not exist in *Monsey*, where the corporation itself was not under audit.

Similarly, when it received the case back after the denial of certiorari without prejudice in *Kyriaco*, the district court continued to stay enforcement of the summons on the ground that, after the petition for certiorari was filed, the case was referred to the Department of Justice with a recommendation of prosecution. *United States* v. *Kyriaco*, 326 F.Supp. 1184 (C.D. Cal. 1971). *See also United States* v. *Marine Midland Bank of New York*, 585 F.2d 36, 39 (2d Cir. 1978).

The time is now ripe for the Court to consider the question it postponed ten years ago in *Kyriaco* — whether a subsequent recommendation of criminal prosecution renders a summons unenforceable. We believe that, upon such consideration, the Court will conclude that when the government becomes institutionaliy committed to criminal prosecution — whether before or after the summons is issued — it is inappropriate to enforce a civil summons. We believe that conclusion follows from the Court's insistence in *LaSalle* that the Service use the summons authority in good faith "at all times." The relevant inquiry is not *when* a summons is issued, but whether this sensitive tool of compulsory administrative process may *at any time* be used in aid of a criminal prosecution.

Because an IRS summons is not self-enforcing, the heart of the summons procedure is not the issuance of a summons but its enforcement. As this Court has stated, "[i]t is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *United States* v. *Powell*, 379 U.S. 48, 58 (1964). Enforcement of a summons while the Department of Justice is contemplating criminal prosecution is nothing less than an abuse of process.

Moreover, since civil aspects of a tax investigation are held in abeyance during the pendency of a criminal prosecution, the Service has no present civil need for the records sought. When the recommendation for prosecution has run its course — either through abandonment or trial — a court can consider the ques-

tion of civil summons enforcement. Enforcement of the summons against Vetco at this time serves no purpose other than permitting the government to use an administrative summons to gather evidence in a criminal case — the very evil that this Court has specifically condemned.

The Court should grant the writ of certiorari on the question here presented as well as the question stated in the petition. [2]

Respectfully submitted,

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November 1981

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[2] It is true that the issue as posed in this memorandum has not been considered by the court below and that ordinarily this Court, presented with such a new issue, would be disposed to vacate the judgment and remand to permit the issue to be considered initially by the lower courts. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); United States v. Ortiz, 422 U.S. 891, 898 (1975). Here, however, the issue is one of law unaffected by particular circumstances beyond the unquestionable facts — the issuance of the summons, the stay of definitive judicial enforcement action, and the subsequent recommendation of prosecution. Moreover, the views of the court below on the issue are already known. United States v. Cromer, 483 F.2d 99, 101 (9th Cir. 1973) (p. 3, *supra*). Vacation and remand would serve no purpose in these circumstances.

APPENDIX A

DISTRICT COUNSEL

Internal Revenue Service

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Main Post Office
P.O. Box 2031
Los Angeles, California 90053

SEP 2 1981

CC:LA-CT-29-81

RECEIVED
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KINDEL & ANDERSON

John Armagost, Esq.
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Re: Vetco, Inc. and Subsidiaries
Ventura, California

Dear Mr. Armagost:

This is to advise that the above-entitled case has been forwarded to the Department of Justice, Washington, D.C.

Sincerely,

JOHN O. KENT
Special Trial Attorney

Opposition

Office - Supreme Court, U.S.
FILED
NOV 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-351

In the Supreme Court of the United States

OCTOBER TERM, 1981

VETCO INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the decision below properly enforced Internal Revenue summonses requiring petitioners to permit the Service to examine certain of their corporate books and records that were stored in Switzerland, and imposed sanctions for their noncompliance on the ground that petitioners had failed to prove their allegations that compliance with the summonses would subject them to criminal prosecution by the Swiss authorities.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	20
Appendix A	1a
Appendix B	4a

TABLE OF AUTHORITIES

Cases:

American Industrial Contracting, Inc. v. *Johns-Manville Corp.*, 326 F. Supp. 879 ..... 11, 12
Arthur Andersen & Co. v. *Finesilver*, 546 F.2d 338, cert. denied, 429 U.S. 1096 13
Chase Manhattan Bank, In re, 297 F.2d 611 ..... 11, 14
Couch v. *United States*, 409 U.S. 322 17
Donaldson v. *United States*, 400 U.S. 517 ..... 17, 20
FTC v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 11
First National City Bank of New York v. *IRS*, 271 F.2d 616, cert. denied, 361 U.S. 948 .....10, 11-12
Fontaine v. *SEC*, 259 F. Supp. 880 12
Ings v. *Ferguson*, 282 F.2d 149 14
Magnus, Mabee & Reynard, Inc., In re, 311 F.2d 12, cert. denied, 373 U.S. 902 19
Mannington Mills, Inc. v. *Congoleum Corp.*, 595 F.2d 1287 14-15
Ohio v. *Arthur Andersen & Co.*, 570 F.2d 1370 ..... 10, 14
Societe Internationale v. *Rogers*, 357 U.S. 197 .....8, 9, 10, 11, 13, 14, 15, 16
Trade Development Bank v. *Continental Insurance Co.*, 469 F.2d 35 14
United States v. *Billingsley*, 469 F.2d 1208 20
United States v. *Cromer*, 483 F.2d 99 19

Cases—Continued Page

United States v. *Field*, 532 F.2d 404, cert. denied, 429 U.S. 940 ..... 14, 15
United States v. *First National City Bank*, 396 F.2d 897 ..... 10, 11, 12, 14, 15
United States v. *Garrett*, 571 F.2d 1323 20
United States v. *LaSalle National Bank*, 437 U.S. 298 ..... 18, 20
United States v. *Monsey*, 429 F.2d 1348 20
United States v. *Moriarty*, 435 F.2d 347 20
United States v. *Powell*, 379 U.S. 48 18
United States v. *Rosinsky*, 547 F.2d 249 19-20
Uranium Antitrust Litigation, In re, 480 F. Supp. 1139 ..... 12, 15, 16
Westinghouse Electric Corp. Uranium Contracts Litigation, In re, 563 F.2d 992 ..... 8, 13, 14, 16
X & Y Bank v. *Swiss Federal Tax Administration*, 76-1 U.S.T.C. ¶ 9452 16

Statutes and regulations:

Internal Revenue Code of 1954 (26 U.S.C.):
Section 964 12
Section 964(c) 11
Swiss Penal Code, Article 273 ..... 7, 8, 9, 10, 11
Treasury Regulations on Income Tax, Sections 1.964-3, 1.964-4 (26 C.F.R.) 11

Miscellaneous:

Meyer, *The Banking Secret and Economic Espionage in Switzerland*, 23 Geo. Wash. L. Rev. 284 (1955) 12
Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 Va. J. Int'l L. 747 (1974) 13, 15
Note, *Foreign Nondisclosure Laws and Domestic Orders in Antitrust Litigation*, 88 Yale L.J. 612 (1979) 13, 15
Restatement (Second) of Foreign Relations Law of the United States (1965) 6, 13, 14, 15, 16

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-351

VETCO INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 644 F.2d 1324. The order of the court of appeals amending its earlier opinion is set forth in App. B, *infra*, 4a-5a.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1981. A petition for rehearing filed on behalf of petitioners was denied on July 17, 1981 (Pet. App. 19a). The petition for a writ of certiorari was filed on August 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Vetco Inc. has been engaged in manufacturing, selling, and leasing offshore drilling equip-

ment. During the period in issue (1971-1976), it had a number of overseas subsidiaries, one of which, Vetco International, A.G. (VIAG), had offices in Zug, Switzerland and, until 1977, sold drilling equipment manufactured by other Vetco corporations. When VIAG became a wholly-owned subsidiary of Vetco in the early 1970's, Vetco became subject to Subpart F of the Internal Revenue Code with respect to a possible requirement of reporting VIAG's income [1] (Pet. 2; Pet. App. 2a).

A tax investigation of Vetco by the Internal Revenue Service disclosed that when making a sale to an overseas customer, Vetco or a foreign manufacturing subsidiary would ship the ordered equipment directly to the customer.[2] Vetco would thereafter send Wiedex, A.G. or Zanora, A.G., two Swiss corporations (Wiedex's stock was then owned by a person who was an officer and director of VIAG), an invoice indicating a sale of that equipment to Wiedex or Zanora at 20% below the price quoted the customer. Wiedex or Zanora would then send VIAG an invoice indicating a sale of the equipment to VIAG at 20% below the sale price. Finally, VIAG would invoice the actual customer at the full price (Pet. App. 2a; CR 17 at 7-11, CR 53 at 46, CR 59 at 3-9, CR 77 at 2, CR 89 at

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[1] For the years in issue, Subpart F of the Internal Revenue Code provided that the income of a controlled foreign subsidiary was to be reported on a domestic parent corporation's income tax return if 30% or more of the subsidiary's income was derived from transactions with related corporations located outside the country of the subsidiary's incorporation.

[2] None of the customers actually conducted business in Switzerland. None of the equipment was manufactured in, stored in, or shipped through Switzerland.

27-30; Appellees' Mem. Opposing Stay Pending Appeal at 27-30).[3]

The effect of the invoicing through VIAG was to shift part of the profit from the manufacturing entity to VIAG so as to produce a tax saving. Wiedex and Zanora were used as conduits so that Vetco would not be required under Subpart F to report VIAG's income in the transactions as income of Vetco. By interposing Wiedex and Zanora between Vetco and VIAG, the transactions had the appearance of having been made with unrelated corporations and, therefore, the Subpart F requirements for reporting income derived from transactions with a related corporation would not apply (Pet. 2-3; Pet. App. 2a-3a; CR 17 at 7-11, CR 53 at 46, CR 59 at 3-9, CR 77 at 2, CR 89 at 27-30; Appellees' Mem. Opposing Stay Pending Appeal at 27-30).

In March 1976, Vetco authorized Deloitte, Haskins & Sells (DH&S), Vetco's accounting firm, to conduct a general, world-wide tax survey. When DH&S discovered Vetco's use of the Wiedex conduit, it advised Vetco officials that information concerning Wiedex should be provided to the Internal Revenue Service, which was auditing Vetco for its taxable years 1971 through 1976. The information concerning the conduits was provided to the IRS in the fall of 1976[4] (Pet. App. 2a, 3a).

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[3] "CR" references are to docket control numbers assigned by the Clerk of the United States District Court to the documents comprising the original record on appeal before the Ninth Circuit in *United States* v. *Vetco, Inc.*, No. 78-1179 (C.D. Cal.).

[4] Vetco's taxable year began on May 1 and ended April 30. Thus, its 1976 tax year ended on April 30, 1976.

After the assignment of a criminal investigator to the audit, Vetco ceased honoring the Internal Revenue Service's requests for information. Consequently, in October 1977, the Service issued the summonses here in question. The summonses sought, *inter alia*, the books and records of Vetco, its overseas subsidiaries, and DH&S' Swiss affiliate for the period 1971 through 1976. Following Vetco's refusal to comply, the government and Special Agent Robert R. Handley initiated these proceedings to enforce the summonses in March 1978 in the United States District Court for the Central District of California (Pet. 3-4; Pet. App. 1a-3a).

During December 1978-November 1979, the district court considered the question whether the Internal Revenue Service would be allowed to examine the records which Vetco and DH&S kept in Switzerland[5] (Pet. 3-5; Pet. App. 2a-3a). Vetco and DH&S

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[5] By the spring of 1979, Vetco had agreed to produce all of its foreign records called for by the summonses, other than those located in Switzerland, for examination by the IRS at the sites at which they were stored. Once the parties had agreed to the on-site examinations, Vetco began raising various administrative obstacles to this agreement, such as refusing to provide office space. As a result, the Service sought and obtained a court order establishing ground rules for the examinations. The on-site examinations were conducted at Vetco's overseas offices during the late summer and early fall of 1979. The government has alleged in motions filed in the district court that, at almost every site, the audit team was hampered by the condition of the records and/or the efforts of Vetco officials. For example, the audit team was frequently told that records sought were lost or destroyed, or that requested records need not be produced under the district court's ground rules. At one inspection site, the audit team examined records which had had parts removed by scissor cutting. As a consequence of those difficulties, the government filed several motions in late 1979 to have Vetco

submitted evidence tending to show that, in general, Swiss law prohibited the divulgence of business secrets of third parties without their consent, and that the Swiss records contained information which could conceivably be business secrets. In response, the government submitted evidence that showed that a large part of Vetco's Swiss records had been duplicated in other overseas offices, and that the Service had examined the duplicate records. The government's evidence also showed that Swiss law would not proscribe a recordkeeper from delivering to the government records, such as the records in the instant case, which were required to be kept and made available to the government under United States law, if such production were made pursuant to a court order (Pet. 5; CR 36, CR 48 at 10-16, 22-30, CR 59 at 17-18).

In November 1979, the district court ordered the summonses enforced as to Vetco's and DH&S' Swiss records, and refused to grant stays. When the summoned records were not subsequently produced, the government moved to have Vetco and DH&S held in contempt and sanctions imposed. On March 28, 1980, the district court ordered the summoned parties to produce their Swiss records in Los Angeles by April 11, 1980, or incur a fine of $500 per day for every day thereafter passing without the production of the records. Although the district court did not enter specific findings of fact or conclusions of law, it did conclude that no substantial risk of prosecution by the Swiss existed (Pet. 4-5; Pet. App. 3a-4a). On

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held in contempt and to have sanctions imposed (CR 9 at 17-20, CR 49 at 2, CR 54 at 54, 79-83, 86, CR 60 at 3-4, CR 62 at 2-10, 15-18, CR 64 at 20-23, CR 78 at 6, CR 88 at 3-4, CR 89 at 2-14, 21-26, CR 91 at 76-79, CR 101 at 8, 14).

April 14, 1980, the court of appeals stayed the district court's orders pending appeal.

The court of appeals affirmed (Pet. App. 1a-17a). In so holding, the court rejected petitioners' unproved allegations that compliance with the summonses would subject them to prosecution by the Swiss authorities. The court rendered this ruling after engaging in the balancing process recommended by the *Restatement (Second) of Foreign Relations Law of the United States* (1965) for dealing with situations where a party is confronted with the conflicting legal requirements of two national governments. The court first observed that although Switzerland has an interest in preserving the secrecy of business records, its interest is diminished where, as here, the documents belong to Swiss subsidiaries of foreign corporations. Moreover, the court found that Switzerland's interest was further diminished in light of the paramount interest of the United States in "collecting taxes from and prosecuting tax fraud by its own nationals operating through foreign subsidiaries" (Pet. App. 12a).

Finally, the court of appeals found that petitioners had failed to show that they faced a serious danger of prosecution if the records were produced.[6] The

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[6] Vetco submitted to the court of appeals excerpts of what it represented to be a letter from the Swiss Embassy in Washington, D.C. to the Government of the United States. The excerpts read to the effect that, if, in complying with the summonses, Vetco were to disclose business or manufacturing secrets of third parties, the Swiss Attorney General would be required to initiate a judicial inquiry into the matter. Vetco urged that the letter disclosed the concern of the Swiss that the summons enforcement proceedings might bring about a violation of their criminal law. In its petition (at 5-6), Vetco suggests that the excerpts support its position that it would risk criminal prosecution if it delivered the Swiss records to

court pointed out that the summoned parties had presented no evidence that any independent third parties objected to the disclosure of information and that a representative of the Swiss Federal Attorney had stated that compliance with the court order could constitute a defense to the charge of violating Article 273 of the Swiss Penal Code. Noting that the summoned parties had created the predicament with which they were confronted, the court of appeals observed that Vetco was required by American law to keep the summoned records and make them available to the United States Government. In the court's view, had Vetco attempted to satisfy those requirements by keeping authenticated copies in the United States, there could have been no threat of prosecution (Pet. App. 13a-14a).[7]

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the Internal Revenue Service. After the submission of the excerpts to the court of appeals, the government's attorneys conducted an inquiry concerning the letter. They learned that the letter was an informal draft prepared by a member of the Swiss Embassy staff. The Swiss now regard the letter as a "non-paper," *i.e.*, that it does not constitute a formal document or position paper of any kind. The letter was neither signed nor officially submitted to the United States Government. The Swiss Embassy emphasized that the Swiss Government had no desire to express an official position with respect to this litigation (see App. A, *infra*, 1a-3a).

[7] On August 8, 1981, the court of appeals granted Vetco a stay of the mandate pending disposition of its petition for certiorari. Since the court of appeals issued its decision, DH&S has delivered to the Service what it claims are all of its Swiss records. The information pertinent to the tax investigation in DH&S' Swiss records is derived from Vetco's Swiss records. According to Vetco's attorneys, Vetco also has delivered some of its Swiss records to the Service. They have determined that the delivery of such records does not expose Vetco to the danger of a Swiss prosecution.

ARGUMENT

The decision below properly rejected petitioners' unproved allegations that production of the records in question would subject them to prosecution by the Swiss authorities, and therefore correctly enforced the summons calling for inspection of petitioners' Swiss records and imposed sanctions for their noncompliance.

1. Petitioners argue (Pet. 3, 5-6, 14-15) that production of the records would violate Article 273 of the Swiss Penal Code,[8] thereby subjecting them to the risk of a Swiss prosecution. In support of their contention, petitioners rely upon this Court's decision in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), which they claim bars without exception the imposition of contempt sanctions for failure to produce records from a foreign country whenever it is alleged that production would subject the possessor to a risk of foreign prosecution.

But petitioners' reliance on *Societe Internationale* is misplaced because they failed to prove that production of Vetco's Swiss records would subject them to a genuine risk of Swiss prosecution. In *Societe Internationale*, *supra*, 357 U.S. at 200, 204, there was little doubt that production of the Swiss records would subject the plaintiff to a risk of prosecution. See also *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 995 (10th Cir. 1977). The records at issue in that case were those of a Swiss banking firm, contained information relating to Swiss nationals, and were being sought from a Swiss cor-

[8] Article 273 prohibits the delivery of records stored in Switzerland which contain business secrets pertaining to *independent* third parties to officials of foreign governments without the consent of the third parties.

poration (357 U.S. at 199-200). They had been constructively seized by the Swiss Federal Attorney after he had concluded that their release to the United States Government would violate Article 273 (357 U.S. at 200). A special master of the district court had made a formal finding that production of the records would violate Swiss law (*id.* at 201). The constructive seizure made clear that Swiss justice officials would seriously consider prosecuting any disclosure of the information. There was no suggestion that production of the records in compliance with an order of a United States court would constitute a defense to a charge of violating Article 273. Finally, the records were not required to be kept and made available to American officials by United States law.[9]

Here, on the other hand, production of Vetco's Swiss records would violate Swiss law only if they contained confidential information pertaining to independent third parties who refused to consent to the disclosure of the information. The evidence presented below raised substantial questions as to (1) whether the confidential information in the records concerned any unrelated entities, (2) whether the information in Vetco's Swiss records pertaining to third parties was confidential, and (3) whether any

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[9] Petitioners suggest (Pet. 7) that the United States Government made no effort to obtain the assistance of the Swiss authorities in the matter, and that the government has not presented any proof of Swiss reluctance to provide assistance. In the district court proceedings, however, the government presented a letter from Dr. Pierre Schmid, Chief of the Section of International Judicial Assistance of the Swiss State Department of Justice and Police. The letter stated that, because of the fiscal nature of the government's tax investigation, the Swiss Government and its courts could provide no assistance (CR 128 at 28-29).

independent third parties would object to the disclosures. Cf. *Ohio* v. *Arthur Andersen & Co.*, 570 F.2d 1370, 1373-1374 (10th Cir. 1978); *First National City Bank of New York* v. *IRS*, 271 F.2d 616, 619 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960). Although petitioners defined the conditions (*e.g.*, confidential information concerning independent third parties) under which a disclosure might violate Swiss law, the court of appeals correctly observed (Pet. App. 9a-10a) that they did not establish that those conditions were present in this case. Cf. *Ohio* v. *Arthur Andersen & Co.*, *supra*, 570 F.2d at 1371-1374; *First National City Bank of New York* v. *IRS*, *supra*, 271 F.2d at 619. *Societe Internationale* is therefore inapposite.[10]

Moreover, even if petitioners' proof as to a violation of Swiss law had been more substantial, it would not

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[10] Before the court of appeals' decision, petitioners had not produced any records from Switzerland. Cf. *United States* v. *First National City Bank*, 396 F.2d 897, 898 (2d Cir. 1968). The records that petitioners claim (Pet. 4, 12) they produced prior to the decision were duplicates stored outside of Switzerland. Petitioners now claim (Pet. 6 n.2) they have been delivering such of their Swiss records as they can without violating Swiss law since the court of appeals' decision. Cf. *Ohio* v. *Arthur Andersen & Co.*, *supra*, 570 F.2d at 1373-1374. The United States Attorney in Los Angeles reports, however, that those records have been few and of little relevance to the government's tax investigation. Indeed, the court of appeals noted (Pet. App. 9a n.6) that "[b]y contrast, the district court stated at a hearing on April 1, 1980 that the appellants were conducting 'one of the greatest delaying actions of my recent memory.'" And while petitioners claim (Pet. 12) that they have consulted with Swiss officials concerning the production of Vetco's Swiss records, the only evidence of such "consultations" is a letter from the Swiss Attorney General generally stating that certain disclosures of third party business secrets violate Article 273.

have established the likelihood of prosecution. Unlike the situation in *Societe Internationale, supra*, 357 U.S. at 200-201, the Swiss authorities have not taken any action in this case to prevent the transmission of the records to the United States. Cf. *United States* v. *First National City Bank*, 396 F.2d 897, 904 (2d Cir. 1968); *American Industrial Contracting, Inc.* v. *Johns-Manville Corp.*, 326 F. Supp. 879, 880 (W.D. Pa. 1971). To the contrary, the business transactions investigated here occurred outside of Switzerland, VIAG is a subsidiary of the United States corporation, and the tax liabilities at issue are United States tax liabilities of a United States corporation. Moreover, contrary to other proceedings in which United States courts have been reluctant to order actions that might conceivably violate foreign law (see *FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1306 n.18 (D.C. Cir. 1980); *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962)), the Swiss have not otherwise officially expressed concern with regard to the actions taken below. The evidence showed that a disclosure of confidential information required by the order of a foreign court would not violate Article 273, and that a violation would not occur where, as here, the records were required to be kept and made available to the Internal Revenue Service by United States law.[11] Cf. *First National City Bank of New York* v.

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[11] Vetco was required by Section 964(c) of the Internal Revenue Code of 1954 (26 U.S.C.) to keep and make available to the Internal Revenue Service such records as would enable it to determine whether Subpart F reporting of VIAG's income was required, *i.e.*, the VIAG records in Switzerland. See also Treasury Regulations on Income Tax, Sections 1.964-3 and 1.964-4 (26 C.F.R.). If a complete set of duplicates had

IRS, *supra*, 271 F.2d at 620; *Fontaine* v. *SEC*, 259 F. Supp. 880, 888-890 (D.P.R. 1966). In short, there was no significant involvement by the Swiss authorities in this case. Cf. *United States* v. *First National City Bank*, *supra*, 396 F.2d at 905; *American Industrial Contracting, Inc.* v. *Johns-Manville Corp.*, *supra*, 326 F. Supp. at 880; see also Meyer, *The Banking Secret and Economic Espionage in Switzerland*, 23 Geo. Wash. L. Rev. 284, 317 (1955).[12]

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been kept in this country, delivery of the duplicates to the government in accordance with Section 964 would have been made without any possible violation of Swiss law. Cf. *Fontaine* v. *SEC*, 259 F. Supp. 880, 888-890 (D.P.R. 1966). Since Vetco chose not to keep such duplicates in this country, any problem with Swiss law is in large part one of its own making. Cf. *In re Uranium Antitrust Litigation*, 480 F. Supp. 1139, 1147 (N.D. Ill. 1979).

[12] Petitioners further complain (Pet. 14) that the court of appeals made no determination as to whether production would expose them to a threat of prosecution. They are mistaken. The court of appeals explicitly stated (Pet. App. 13a-14a; footnote omitted):

> We are not persuaded that Article 273 poses a great danger to the appellants. The party relying on foreign law has the burden of showing that such law bars production. * * *
>
> There is no evidence that unrelated third parties with an interest in the confidentiality of the summoned records would object to production. An affidavit from a representative of the Swiss Federal Attorney states that where production is pursuant to an order of a United States Court enforcing an IRS summons there may be a defense to a charge of violating Article 273. Article 34 of the Swiss Penal Code provides a defense to criminal charges based upon duress.

It is therefore plain that the court of appeals concluded that petitioners had the burden of establishing a risk of prosecution and that they had failed to carry their burden.

2. Contrary to petitioners' further argument (Pet. 16-17), the court of appeals correctly employed the analysis of § 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965).

Indeed, the *Restatement* is simply a reiteration of this Court's *Societe Internationale* decision. The opinion in that case leaves little room for doubt that a federal trial court has power to order a person subject to its in personam jurisdiction to take action potentially conflicting with the law of another country and to impose sanctions for a refusal to comply. See also *In re Westinghouse Electric Corp. Uranium Contracts Litigation, supra*, 563 F.2d at 997; *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977); Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 Va. J. Int'l L. 747, 749-750 (1974). When authority to order such action is provided by United States law, the requirements of one country's law must be subordinated to those of the other. *Societe Internationale* (357 U.S. at 204-206, 208-209) does not mandate an automatic deference to the foreign law. Rather, it suggests a flexible approach focused on the particular circumstances. See also *In re Westinghouse Electric Corp. Uranium Contracts Litigation, supra*, 563 F.2d at 997; Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 Yale L.J. 612, 615 (1979).

The balancing process suggested by § 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) offers the proper analytical framework under which a federal court may assess the relevant considerations set forth in *Societe Inter-*

nationale in determining what result is appropriate.[13] Indeed, the courts of appeals have uniformly employed the *Restatement*'s balancing process to deal with the conflicting law problem in a manner which *Societe Internationale* indicates is necessary. See *Ohio* v. *Arthur Andersen & Co.*, *supra*, 570 F.2d at 1373; *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, *supra*, 563 F.2d at 997-998; *United States* v. *Field*, 532 F.2d 404, 407-408 (5th Cir.), cert. denied, 429 U.S. 940 (1976); *United States* v. *First National City Bank*, *supra*, 396 F.2d at 901;[14] see also *Mannington Mills, Inc.* v. *Con-*

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[13] In employing this process, the considerations taken into account are:

(a) the vital national interests of each of the states,

(b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

[14] In earlier cases in which the Second Circuit confronted the situation where process or a discovery order sought documents from a foreign country and where it was alleged that production would violate foreign law, the court indicated that it was inclined to defer to the foreign country if it were firmly established that production would in fact violate foreign law. *In re Chase Manhattan Bank*, *supra*; *Ings* v. *Ferguson*, 282 F.2d 149, 151-153 (2d Cir. 1960). Since the *Restatement* was published, the Second Circuit has adopted a more flexible approach incorporating the use of the balancing process. *Trade Development Bank* v. *Continental Insurance Co.*, 469 F.2d 35, 41 (2d Cir. 1972); *United States* v. *First National City Bank*, *supra*, 396 F.2d at 900, 902.

goleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979); Note, *supra*, 88 Yale L.J. at 616, 619-620.

In accord with these precedents, the court of appeals here properly employed the appropriate balancing process and carefully considered each of the relevant factors in arriving at its decision (see Pet. App. 10a-16a). Petitioners contend (Pet. 16-17), however, that in so doing, the court of appeals erred because the balancing process has not been explicitly approved by this Court.[15] But the *Restatement* is nothing more than a fuller and more generic statement of the factors considered in *Societe Internationale*, *supra*, 357 U.S. at 204-206 (*e.g.*, vital national interest and hardship) or which the Court

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[15] There are other differences between this case and *Societe Internationale*. Here, the summonses were issued in furtherance of an investigation into conduct that was possibly of a criminal nature. In *Societe Internationale*, the discovery order was issued in a purely civil case, albeit one which involved an important public interest of the United States. Petitioners suggest (Pet. 10) that this "distinction * * * with all respect [is] so tenuous that it is hard to take seriously." But as the court of appeals correctly pointed out, when confronted with allegations that compliance would violate foreign law, the courts have given greater consideration to process issued in furtherance of a criminal investigation or in cases involving violations of criminal law, than they have to process issued in a purely civil suit. *United States* v. *Field*, *supra*, 532 F.2d at 406, 407; *United States* v. *First National City Bank*, *supra*, 396 F.2d at 902-903; *In re Uranium Antitrust Litigation*, *supra*, 480 F. Supp. at 1154; see also Note, *supra*, 14 Va. J. Int'l L. at 748. As the courts have noted, the criminal laws may generally be considered codifications of significant public policies. See *United States* v. *Field*, *supra*, 532 F.2d at 407-408; *United States* v. *First National City Bank*, *supra*, 396 F.2d at 902-903.

indicated (*id.* at 212-213) should be considered (*e.g.*, alternatives to giving preference to domestic law). See *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, *supra*, 563 F.2d at 997-998; *In re Uranium Antitrust Litigation*, 480 F. Supp. 1139, 1146 (N.D. Ill. 1979).

Finally, in considering alternatives to enforcing the summonses which might have been directed without possible conflict with Swiss law, the court of appeals did not, as petitioners assert (Pet. 18), adopt a posture of "determined negativism." Nor did it reject alternatives because they would not produce results identical to those which enforcement of the summonses would. Instead, the court considered whether the suggested alternatives would likely produce a result which is substantially as effective as enforcement of the summonses (Pet. App. 15a-16a). Neither the *Restatement* nor *Societe Internationale* indicates that a court must refrain from ordering an action authorized by law merely because foreign law offers an ineffective substitute.[16]

3. In a supplemental memorandum filed on November 4, 1981—more than two months after the petition for a writ of certiorari was filed—petitioners call the Court's attention to the fact that on September 2, 1981, the Internal Revenue Service recom-

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[16] Contrary to petitioners' argument (Pet. 6-7), Vetco's Swiss records cannot be obtained through use of letters rogatory or the exchange of information provisions of the United States-Swiss tax treaty. See *X & Y Bank* v. *Swiss Federal Tax Administration*, 76-1 U.S.T.C. ¶ 9452, at 84,213 (Swiss Sup. Ct. 1975). Awaiting the consents of all of the third parties mentioned in the records, regardless of whether the information pertaining to them is confidential, would cause a substantial delay in the investigation during which the statutes of limitations might expire.

mended to the Department of Justice that criminal proceedings be instituted against petitioner Vetco. Petitioners view this event as introducing a new issue, *viz.*, whether the summonses are rendered unenforceable because of the IRS recommendation after the summonses were issued but before there is a final judgment order of enforcement (see Supp. Mem. 1).

But the additional question as to which petitioners seek review has already been resolved against them by the decisions of this Court. In *Donaldson* v. *United States*, 400 U.S. 517, 536 (1971), the Court clearly stated that there are only two statutory limitations upon enforcement of an IRS summons: It must be "issued in good faith and prior to a recommendation for criminal prosecution." Subsequently, in *Couch* v. *United States*, 409 U.S. 322 (1973), the Court reaffirmed the principle that it is the issuance date of the summons that determines its enforceability. There, the summons was directed against an accountant, who thereafter transferred the records sought to an attorney. The Court, however, refused to ascribe significance to this post-issuance transfer of the records in determining the validity of a constitutional defense against enforcement. As the Court emphatically stated, "[b]ut constitutional rights obviously cannot be enlarged by this kind of action. The rights and obligations of the parties became fixed when the summons was served, and the transfer did not alter them" (*id.* at 329 n.9). If the constitutional rights claimed in *Couch* were fixed as of the time a summons is served, surely petitioners' statutory rights to challenge the summonses in this case likewise became fixed at the time they were served.

Finally, the Court reaffirmed the *Donaldson* principle establishing the date of issuance of the summons

as the appropriate standard in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). There, the Court concluded (*id.* at 318; footnote omitted; emphasis supplied):

> In summary, then, several requirements emerge for the enforcement of an IRS summons. *First, the summons must be issued before the Service recommends to the Department of Justice that a criminal prosecution, which reasonably would relate to the subject matter of the summons, be undertaken.* Second, the Service at all times must use the summons authority in good-faith pursuit of the congressionally authorized purposes of § 7602. This second prerequisite requires the Service to meet the *Powell* standards of good faith. It also requires that the Service not abandon in an institutional sense * * * the pursuit of civil tax determination or collection.

It is undisputed that the service of the summonses in this case long antedated the IRS recommendation for prosecution in this case. Moreover, there is no suggestion that the Service has abandoned in an institutional sense the pursuit of civil tax determination or collection. Contrary to petitioners' contention (Supp. Mem. 5), the IRS recommendation in this case does not cast doubt upon the Service's good faith in issuing the summonses or its compliance with the standards of *United States* v. *Powell*, 379 U.S. 48, 57 (1964). Nor does that recommendation represent a "departure from the normally inseparable goals of examining whether the basis exists for criminal charges and for the assessment of civil penalties." *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 314.

Indeed, the soundness of using the date of issuance of the summonses as the appropriate standard is con-

vincingly demonstrated by the facts of this case. Here, the Internal Revenue Service issued the summonses in October 1977, and they have still not been enforced. We are advised by the Service that the statute of limitations for the proposed criminal charges against one of petitioner Vetco's officers will expire on December 31, 1981. In these circumstances, the Service had no choice but to forward the entire case involving petitioners to the Department of Justice if a timely indictment were to issue by December 31, 1981. Surely petitioners should not be able to seek the protection of the statute of limitations as a result of conducting what the district court characterized as "'one of the greatest delaying actions of my recent memory'" (Pet. App. 9a n.6). As the Second Circuit properly observed in *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12, 16 (1962), cert. denied, 373 U.S. 902 (1963), in rejecting a similar claim where an indictment was issued subsequent to the service, but prior to the enforcement of, the summons—

> To prevent enforcement of such summonses because compliance was resisted for such a lengthy period that the government was forced to return an indictment to prevent the criminal statute of limitations from running would encourage litigants to resist such summonses wholly for the purpose of delay. * * * The summonses as originally issued came well within the purposes designated in the statute, and we deem the time of issuance to be the significant date on which to base a determination of the validity of a Section 7602 summons.

Accord: *United States* v. *Cromer*, 483 F.2d 99, 101 (9th Cir. 1973); *United States* v. *Rosinsky*, 547 F.2d

249, 254 (4th Cir. 1977); *United States* v. *Garrett*, 571 F.2d 1323, 1327 (5th Cir. 1978).[17]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

NOVEMBER 1981

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[17] The contrary statements of other courts of appeals cited by petitioner (Supp. Mem. 3-4) do not constitute a live conflict in the circuits that is a basis for review. *United States* v. *Monsey*, 429 F.2d 1348, 1351 (7th Cir. 1970), and *United States* v. *Billingsley*, 469 F.2d 1208 (10th Cir. 1972), were both decided prior to this Court's decision in *LaSalle National Bank*. Indeed, *Monsey* antedates *Donaldson*. But cf. *United States* v. *Moriarty*, 435 F.2d 347, 349 (7th Cir. 1970), where the court characterized its *Monsey* decision as dealing "only with the necessity for discovery, not with the ultimate issue of enforcement."

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-5327

Consolidated with Nos. 79-3756, 79-3757, 79-3758, 79-3786, and 80-5276

UNITED STATES OF AMERICA, ET AL., PETITIONERS-APPELLEES

v.

VETCO INC., ETC., ET AL., RESPONDENTS-APPELLANTS

DECLARATION

CITY OF WASHINTON)
) ss
DISTRICT OF COLUMBIA)

I, Mary Jo Grotenrath, declare and state as follows:

1. I am a trial attorney employed in the Office of International Affairs, Criminal Division, Department of Justice. In connection with my duties, I returned a call on September 5, 1980, to an official of the Swiss Embassy who had called this office to voice objection to any anticipated representation by either party in the above case that the Swiss Government had a formal position with respect to any aspect of this case. In particular, we discussed a writing which I located in the Office file and which I now recognize as the document submitted to this Court as Appendix A of Appellant Vetco's reply brief. The informal and unsigned writing in question, which appears on plain bond paper, was prepared unofficially by a member of the staff of the Swiss Embassy in connection with

certain conversations with Lawrence W. Chamblee, trial attorney in this Office who is currently on extended leave. Both the representative of the Swiss Embassy and Lawrence W. Chamblee have assured me that the paper in question (Appendix A of Appellant Vetco's reply brief) is not a formal document or position paper of any kind. In fact, the writing has been and is now described by the Swiss Embassy in Washington, D.C. as a "non-paper."

After checking with Charles E. Brookhart of the Appellate Section, Tax Division, Department of Justice, one of the attorneys responsible for handling this case, I again called the Swiss Embassy to assure the Swiss Government that the United States had neither made nor intended to make any representation to this Court with respect to any official position of the Swiss Government since we were and are in fact aware of no official position and that to the best of my knowledge no other party to the case had made any representations of an official Swiss position.

2. Late in the afternoon on September 12, 1980, Charles E. Brookhart of the Tax Division, advised me by telephone that certain appellants herein, in a Reply Brief filed with this Court, attached as Appendix A thereto the previously described informal and unsigned writing.

The Appendix is captioned: "Text of Letter From the Embassy of Switzerland to the Government of the United States, dated May 13, 1980," and the writing is identified, at page 10 of the Appellant Vetco's reply brief, as a "May 13, 1980, letter by the Swiss Ambassador addressed to the U.S. Justice Department." The writing is further described, at page 10 of Appellant Vetco's reply brief, as evidence of "expressions of the highest concern by the Swiss Government."

3. Immediately following Mr. Brookhart's telephone call, I called the Swiss Embassy to report these facts and express my regrets that this had occurred in view of my representation in our earlier conversation that no such paper had been filed as of that date and my clear understanding that the Swiss Government had no official position. I inquired whether it would be possible, in view of this turn of events, for the Swiss Government to furnish the Department of Justice, for filing with this Court, a statement to the effect that it had indeed expressed no official position on any aspect of this case. In view of the late hour, the official offered to call me back on this point on Monday, September 15, 1980.

4. On Monday morning, September 15, 1980, an official of the Swiss Embassy telephoned to advise that the Swiss Government deemed it inappropriate to volunteer any formal statement in connection with this case. I asked whether there would be any objection to my making a declaration setting forth this fact for filing prior to oral argument, which was scheduled for Wednesday, September 17, 1980, including a representation to the Court that the Swiss Government had expressed no official position with respect to any aspect of the case before this Court. I was advised that there was no objection to my making a declaration of this nature for this purpose.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 16, 1980.

/s/ Mary Jo Grotenrath
MARY JO GROTENRATH
Attorney
Office of International Affairs
Criminal Division
United States Department of Justice

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DC #CV 78-1179-LEW

Nos. 79-3756, 79-3757,
79-3758, 79-3786,
80-5276, 80-5327

UNITED STATES OF AMERICA and ROBERT R. HANDLEY,
Special Agent of the Internal Revenue Service,
PETITIONERS-APPELLEES

vs.

VETCO INC., formerly Vetco Offshore Industries and Subsidiaries; RONALD G. CULLIS, Financial Vice President and/or LARRY R. LANGDON, Secretary,
RESPONDENTS-APPELLANTS

UNITED STATES OF AMERICA and ROBERT R. HANDLEY,
Special Agent of the Internal Revenue Service,
PETITIONERS-APPELLEES

vs.

DELOITTE HASKINS & SELLS,
Certified Public Accountants, RESPONDENT-APPELLANT

Filed Oct. 22, 1981

Appeal from the United States District Court
for the Central District of California

Laughlin E. Waters, District Judge, Presiding

Argued and submitted September 17, 1980

Before: SKOPIL and NELSON, Circuit Judges, and
EAST,* District Judge

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

ORDER

The following language which now appears at 644 F.2d at 1327-28 is ordered deleted:

> "There is no factual dispute in this case. The questions presented are whether the use of summonses is prohibited by treaty, whether Swiss law prohibits compliance with the summonses, and whether any such prohibition requires that the summonses not be enforced, or that contempt sanctions not be imposed. All of these questions are legal including the question of Swiss law. Fed.R.Civ.P. 44.1; *Kalmich* v. *Bruno*, 553 F.2d 549, 552 (7th Cir.), *cert. denied*, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977)."

In place of the quoted language, the following is ordered substituted:

> "There is virtually no factual dispute in this case. The questions of whether the use of summonses is prohibited by treaty is a question of law. Swiss law is also determined as a question of law. Fed.R.Civ.P. 44.1; *Kalmich* v. *Bruno*, 553 F.2d 549, 552 (7th Cir.), *cert. denied*, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977). The few factual inquiries in the case are either immaterial or adequately addressed by the district court's on-the-record statements. *Compare South-Western Publishing Co.* v. *Simons*, No. 79-3035, slip op. at 3614 & n.2 (9th Cir. July 20, 1981) *and Richmond Elks Hall Ass'n* v. *Richmond Redevelopment Agency*, 609 F.2d 383, 385-86 (9th Cir. 1979) *and Swanson* v. *Levy*, 509 F.2d 859, 861 (9th Cir. 1975) *with Lumbermen's Underwriting Alliance* v. *Can-Car, Inc.*, 645 F.2d 17, 18 (9th Cir. 1980)."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 357475 660

Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
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CLERK

No. 81-351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VETCO INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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November 1981

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TABLE OF AUTHORITIES

CASES:	Page
Couch v. *United States*, 409 U.S. 322 (1973)	3
Donaldson v. *United States*, 400 U.S. 517 (1971)	3
Kyriaco v. *United States*, 401 U.S. 922 (1971)	3
Reisman v. *Caplin*, 375 U.S. 440 (1964)	4
Societe Internationale pour Participations Industrielles et Commerciales v. *Rogers*, 357 U.S. 197 (1958)	2, 3
United States v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978) .	3, 4
United States v. *Powell*, 379 U.S. 48 (1964)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITIONERS' REPLY BRIEF

The Government would portray Vetco as engaged in a continuing tax fraud and a campaign to keep evidence of that fraud under cover. The portrayal rests, and on the record of this proceeding can rest, only on the Internal Revenue Service's assertions. It should not be thought that the assertions necessarily reflect the truth. The evidence seems to indicate, for example, that transactions involving two Swiss companies, Wiedex and Zanora, which appear to be at the heart of the Government's charges (Br. in Opp. 2-3), affected tax liability, if at all, only for the fiscal year 1972. Moreover, Vetco apparently brought the matter to the attention of its outside accountants in 1973 rather than, as the Government asserts (*id.* at 3), being told of the matter by its accountants, and not until 1976.

The Government asserts that summonses were issued "in October 1977, and they still have not been enforced." (*Id.* at 19.) The summons addressed to Vetco's accountants has been enforced and complied with (*id.* at 7 n.7), the district court ruled that the summons addressed to Vetco's lawyers need not be complied with (Pet. 3a), and in response to the summonses issued to Vetco and two of its then

officers millions of documents have been produced.[1] We are here dealing only with the residue of documents that are affected by Swiss secrecy law.

The millions of documents that have been produced by Vetco include documents from Switzerland that Vetco has enabled itself to turn over without risk of prosecution by obtaining necessary third-party consents. (Pet. 6 n.2.) The Government quotes the United States Attorney in Los Angeles as reporting "that those [Swiss] records have been few and of little relevance to the Government's tax investigation." (Br. in Opp. 10 n.10.) Among them, it should be noted, are the entire Swiss files of Wiedex and Zanora for the years in question. If these are "few and of little relevance," it is fair to assume that the remaining records are of even less relevance and importance.

1. The Government, relying on an affidavit that the court of appeals declined to receive when counsel tried to hand it up at the time of oral argument, questions whether the Swiss authorities have stated a position in this case. (Br. in Opp. 6 n.6.) If, indeed, the document from which we have quoted (Pet. 6) does not reflect an official Swiss position, it is immaterial. That, as a general rule, Switzerland is prepared to enforce its secrecy requirements by criminal process seems not to be in doubt. The most that the court of appeals was able to say is that it was not "persuaded that [the relevant Swiss statute] poses a great danger to the appellants" (Pet. 13a) and that "appellants have not shown a substantial likelihood of a successful Swiss prosecution" (Pet. 17a). The Government quotes the first of the court's comments (Br. in Opp. 12 n.12) and quotes as well the reason why the court was not persuaded that Vetco was in great danger — its mistaken belief that Vetco would have a strong defense of duress should there be a prosecution. The Government, however, contents itself with the quotation and does not attempt to defend the court's

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[1] The Government says that the IRS encountered "difficulties" in its examination of some of Vetco's foreign, non-Swiss documents and that it filed motions for contempt and sanctions on account of them. (Br. in Opp. 4 n.5.) What it neglects to say is that the district court was not persuaded by the IRS' account of its "difficulties"; there was no finding of contempt and no sanctions were imposed.

reasoning. The omission is thoroughly understandable. Not only did the court read into a Government expert's reference to the duress defense far more than his testimony warranted (*see* Pet. 5, 14), but also it invoked a mistaken standard: it demanded a showing of a likelihood of a successful prosecution. That is not the standard of the *Interhandel* case, *Societe Internationale pour Participations Industrielles et Commerciales* v. *Rogers*, 357 U.S. 197 (1958). The standard of that case is the threat or the fear of prosecution. *Id.* at 204, 211. It is one thing to inquire into the legitimacy of a respondent's fear of prosecution and quite another to require that one potentially subject to prosecution disprove his own defenses.

The Government says that the analysis found in Section 40 of the current Restatement of the Foreign Relations Law of the United States — which may be substantially revised (Pet. 17 n.11) — "is simply a reiteration of this Court's" *Interhandel* opinion. (Br. in Opp. 13.) We have only the Government's ipse dixit for that proposition. The Government is mistaken. Significantly, it makes no effort to defend the court of appeals' presumptuous weighing of the relative importance of Swiss and United States law, undertaken in the name of the Restatement. Nothing in *Interhandel* implies that courts should engage in that sort of balancing.

2. The Government, citing *Donaldson* v. *United States*, 400 U.S. 517 (1971), *Couch* v. *United States*, 409 U.S. 322 (1973), and *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978), says that this Court has already decided that a summons valid when issued by the IRS remains valid even though a recommendation of criminal prosecution overtakes the civil tax liability investigation in aid of which the summons was issued. That is not so. The question raised by Vetco in its supplemental memorandum is a live question.

Donaldson is the foundation case. The Court obviously did not regard the question here posed as foreclosed by the observation in that case that a summons must be "issued in good faith and prior to a recommendation for criminal prosecution." 400 U.S. at 536. If it had, it would not have taken the extraordinary step just a few weeks later in *Kyriaco* v. *United States*, 401 U.S. 922 (1971), of denying certiorari without prejudice to asking the district court for relief

appropriate in light of developments occurring after the petition for certiorari was filed; the development that the petitioner had invited to this Court's attention was the making of a criminal prosecution recommendation.

Couch came after *Kyriaco* but is no more conclusive than *Donaldson*. It dealt with a summons directed against an accountant who thereafter transferred the records sought to an attorney. The Court quite naturally refused to ascribe significance to the accountant's self-serving transfer. Here the only party that has acted since the summons was issued is the Service.

And *LaSalle Nat'l Bank*, the latest of the three cases, quite obviously leaves room for answering the supplemental question presented as Vetco contends that it should be answered. The Court there stated that not only must a summons be issued before a recommendation of criminal prosecution is made but that "the Service at all times must use the summons authority in good-faith pursuit" of the purposes of the summons statute, which includes the continued "pursuit of civil tax determination or collection." 437 U.S. at 318.

The Government says that the Service has not abandoned the pursuit of civil tax liability. (Br. in Opp. 18.) But, for the time being, it has. Civil aspects of a tax investigation are held in abeyance while a criminal prosecution is pending. Thus, the Service's civil investigation into Vetco's records will not resume until the recommendation of criminal prosecution has been resolved. Enforcement of the summons therefore can serve one purpose only: to permit the government to gather evidence in a criminal case, a purpose that this Court has repeatedly refused to condone. *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964); *United States* v. *Powell*, 379 U.S. 48, 58 (1964).

For all of the above reasons, the Court should grant the writ of certiorari.

Respectfully submitted,

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